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## The CJEU on Trial: Economic Mobility and Social Justice

ADAM MCCANN\*

**Abstract:** This article focuses on the re-regulatory nature of certain European economic freedoms and the subsequent effects on social justice. It examines contentious judgements delivered by the Court of Justice of the European Union (CJEU), wherein private economic arrangements and mobility affect core public goods (namely health care and education) and certain specified fundamental rights (such as the protection of human dignity, the right to family life, and the right to strike). The general critique that cross-border market transactions represent a *de facto* clash between solely private ‘economic’ interests and public ‘social’ considerations is rejected. Such a dichotomy is readily manipulated to evidence the CJEU’s preference for a neo-liberal private law society – whereby core socializing characteristics of the welfare state are undermined to ensure market competition. This reinforces the biased rhetoric of a ‘common interest’ and fails to understand the *raison d’être* behind the economic mobility provisions. Critical analysis requires a more holistic premise advanced by Kukovec, through which the question of a just balance is actually between individual ‘freedoms’ and ‘limitations’. With this more balanced nuance, the compatibility of the controversial decisions with Böhm’s ordo-liberal private law society may be observed – whereby market actors are afforded proportionate protection from both state actor interference (e.g., *Elchinov*, *Watts*, and *Baumbast*) and powerful non-state actor interference (e.g., *Laval* and *Viking*). This article does not promote the argument that all judgments by the CJEU in this regard are explicitly well motivated. The contrary may be said regarding a number of – now infamous – politically sensitive cases. Such methodological failure has contributed to fears of a neo-liberal driven union. However, and this is the crux of the matter, this does not mean that the substantive outcomes support these fears.

**Résumé:** Le présent article étudie le caractère renforcé de la réglementation de certaines libertés économiques européennes et des effets subséquents sur la justice sociale nationale. Il examine des décisions contentieuses de la CJUE dans lesquelles des systèmes privés et une mobilité économique modifient – pour le meilleur ou pour le pire – des biens publics essentiels (principalement les soins de santé et l’éducation) et des droits fondamentaux particuliers (principalement la protection de la dignité humaine, le droit à une vie familiale et le droit de grève). La critique générale, selon laquelle les transactions du marché transnational représentent un conflit de facto entre des intérêts privés ‘économiques’ et des considérations publiques ‘sociales’, est rejetée. Une telle dichotomie est utilisée pour démontrer la préférence de la CJUE pour une société de droit privé plus néo-libérale – où les caractéristiques essentielles

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de socialisation de l'Etat providence sont fragilisées afin d'assurer la concurrence sur le marché. Ceci renforce de manière déterminante la rhétorique faussée d'un 'intérêt commun' et empêche de comprendre la raison d'être des dispositions sur la mobilité indiquées plus haut. Une analyse critique requiert un principe plus global avancé par Kukovec, à travers lequel se pose la question de savoir s'il existe actuellement un juste équilibre entre les 'libertés' et les 'restrictions' individuelles. A partir de ce principe plus nuancé, on peut observer une compatibilité des décisions controversées avec la société de droit privé ordo-libérale de Böhm - là où on accorde aux acteurs du marché une protection *proportionnelle* à la fois contre l'intervention de l'acteur étatique (par exemple *Elchinov, Watts et Baumbast*) et contre l'intervention de l'acteur privé (par exemple *Laval et Viking*). Cet article ne défend pas l'argument selon lequel tous les jugements rendus par la CJUE à cet égard sont motivés explicitement. On pourrait dire le contraire à propos d'un certain nombre d'affaires politiquement sensibles - maintenant tristement célèbres -. Une telle faiblesse méthodologique a alimenté les craintes d'une union tournée vers le néo-libéralisme. Cependant, et c'est le coeur du sujet, cela ne signifie pas que ces appréhensions soient confirmées par les résultats concrets.

**Zusammenfassung:** Dieser Artikel fokussiert die re-regulierende Natur bestimmter wirtschaftlicher EU-Grundfreiheiten und deren Auswirkungen auf die nationale soziale Gerechtigkeit. Er untersucht umstrittene Urteile des EuGH, welche die negative oder positive Auswirkungen privater Maßnahmen und wirtschaftlicher Mobilität auf wesentliche Allgemeingüter (Gesundheitswesen und Bildungswesen) und bestimmte Grundrechte (Schutz der Menschenwürde, Recht auf Familienleben und Streikrecht) betreffen. Die allgemeine Kritik, dass Transaktionen im transnationalen Markt de facto mit privaten 'wirtschaftlichen' Interessen und öffentlichen 'sozialen' Angelegenheiten kollidieren, wird widerlegt. Eine derartige Zweiteilung wird nämlich manipuliert um zu beweisen, dass der EuGH eine Präferenz für eine neo-liberalen Privatrechtsgesellschaft hat - wobei wesentliche vergesellschaftende Charakteristika des Wohlfahrtsstaates untergraben werden, um die Konkurrenz im Binnenmarkt zu gewährleisten.

Entscheidend ist, dass dies die befangene Rhetorik eines 'Allgemeininteresses' stärkt und dass damit das Verständnis der *raison d'être* hinter der besagten Freizügigkeitsbestimmungen verfehlt wird. Eine kritische Analyse erfordert eine ganzheitlichere Prämisse, wie Kukovec vorgeschlagen hat. Dadurch stellt sich die Frage eines gerechten Ausgleichs zwischen individuellen 'Freiheiten' und 'Einschränkungen'. Aus dieser ausgewogeneren Abstufung kann man die Kompatibilität der umstrittenen Entscheidungen mit Böhms ordo-liberalen Privatrechtsgesellschaft beobachten - wo Marktakteure sowohl gegen Eingriffe staatlicher Akteure (z.B. *Elchinov, Watts und Baumbast*) als auch privater Akteure (z.B. *Laval und Viking*) *verhältnismäßig* geschützt werden. Dieser Artikel unterstützt nicht die Argumentation, dass alle Entscheidungen des EuGH in diesem Zusammenhang ausdrücklich gut motiviert sind. Das Gegenteil könnte gesagt werden in Bezug auf einige - nun berühmt-berüchtigte - politisch sensible Fälle. Diese methodische Fehlerhaftigkeit hat zu den Ängsten vor einer neo-liberal angetriebenen Union beigetragen. Jedoch - und dies ist der Kern der Problematik - bedeutet dies nicht, dass die tatsächlichen Ergebnisse diese Ängste rechtfertigen.

## 1. Existential Crisis in the EU

Joseph Weiler once wrote of ‘constitutional moments’ that reflect the beginning or end of a deeper process of mutation in public ethos: a shift in societal self-understanding.<sup>1</sup> The history of the European Union (EU) is inundated with examples of such ‘moments’.<sup>2</sup> For Weiler, the most fundamental moment<sup>3</sup> occurred in the *aftermath* of Maastricht. This moment was not defined by the content of the Treaty (as important as the Economic and Monetary Union and institutional changes were), nor by the value of its symbolic significance, but rather the public debate that ensued after its ratification. The ‘frequently and deliciously hostile’ public objections represented a threat to the very essence of an integrated Europe: an unprecedented degree of intensity and public opinion ‘no longer accepted the orthodoxies’ of European integration. Today, such a hostile ‘constitutional’ moment has reappeared with a vengeance.

First, given the unprecedented current financial and economic crisis, the acute problem is no longer about just the lack of political and democratic legitimacy within the EU but the prominent perception of the Union as ‘an agent of socio-economic distress’. Mass demonstrations across Europe reflect views that the EU has not merely failed to provide prosperity, but that it is actually *causing* the recent hardship faced by millions of Europeans.<sup>4</sup>

Second, a rather significant imbalance must be stressed. When we critique the performance of the EU during such a critical ‘constitutional moment’, intentionally or not, we are making normative assertions about its very existence. The *raison d’être* of the nation state may be presumed given the presence of culturally entrenched and robust structures of political mediation, safeguarded by democratic principles. This is clearly not the case for the EU. Given the taken for granted achievements of ensuring peaceful relations and the current economic austerity, there is no underlying assumption of the EU’s *raison d’être*. Not unlike Monty Python’s line of enquiry about the achievements of the Roman Empire, popular sentiment begs the question: ‘what has the EU ever done for us?’<sup>5</sup> Walker

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1 J.H.H. WEILER, *The Constitution of Europe* (Cambridge: CUP, 1999), p. 3.

2 Such as the creation of the Schuman Declaration, the signing of the Treaty of Rome, the CJEU recognition of supremacy and fundamental rights, the ‘empty chair crisis’, the Luxembourg Accord, the White Paper on the Single Market, the 1986 Single European Act, the 2006 rejection of the Constitutional Treaty, the 2007 Eastern enlargement, and the recent ratification of the Lisbon Treaty, just to name a few.

3 At least this was his view in 1999.

4 G. DE BÚRCA, *Europe’s Rasion D’Être, Working Paper No. 13-09, Public Law and Legal Research Paper Series* (NYU School of Law, March 2013), p. 4. Another version of this chapter by de Búrca appeared in D. KOCHENOV & F. AMTENBRINK (eds), *The European Union’s Shaping of the International Legal Order* (Cambridge: CUP 2013). For de Búrca, the EU’s entire *raison d’être* has thus been called into question.

5 Taken from the film: ‘The Life of Brian’ (Python (Monty) Pictures, 1979).

aptly alludes to the increasing need of ‘original legitimation’ for the EU.<sup>6</sup> In the meantime however, it may be said that the EU’s legitimacy is no more than an ongoing performance-based legitimacy – dependent on the quality of the substantive outcomes it produces.<sup>7</sup>

Third, the current crises arrived somewhat like an unwanted guest at an already unhappy gathering. Following the constitutional debacle in 2005 and the infamous Laval quartet soon after,<sup>8</sup> popular critique raised concerns over the legitimacy of the Union *vis-à-vis* its performance, accusing EU institutions of harbouring Darwinist winner-takes-all motives and sweeping aside national preferences in a quest for maximized market liberalization. Esteemed philosopher Jurgen Habermas argued that the entire integration process is distorted by the neo-liberal philosophy – the ‘original sin’ – that pervades the European treaties. Political scientist Fritz Scharpf described the European socio-economic regime as structurally asymmetric and undermining Continental and Scandinavian social market economies,<sup>9</sup> while Roman Herzog accused the CJEU, in particular, of ‘abusing’ the trust granted upon it to adjudicate in an unbiased way. The former German president<sup>10</sup> claimed that the Court in Luxembourg ‘deliberately and systematically ignores fundamental principles of the Western interpretation of law and ignores the will of the legislator’.<sup>11</sup> Christopher Schmid and Michelle Everson described European justices of engaging in a ‘schematic’ application of the doctrine of *effet utile* to such an extent that it has become no more than a political statement of *effet neoliberal*.<sup>12</sup> Such critiques, coupled with the economic crisis, increase hostility towards the EU as an agent of injustice and thereby (however, indirectly) take aim at the thin leg of output legitimacy the EU has to stand on.

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6 N. WALKER, ‘First Session: Justification, Proportionality and Irrationality’, in D. Kochenov, G. De Burca, A. Williams *et al.* (eds), *Debating Europe’s Justice Deficit: The EU, Swabian Housewives, Rawls and Ryanair*, *EUI Working Paper, Law* 2013/11.

7 DE BÚRCA, *supra* n. 4.

8 C-341/05 *Laval* [2007] ECR I-11767; C-438/05 *Viking* [2007] ECR I-10779; C-319/06 *Commission v. Luxembourg* [2008] ECR I-4323; C-346/06 *Ruffert* [2008] ECR I-1989.

9 F. SCHARPF, ‘The Asymmetry of European Integration or Why the EU Cannot Be a Social Market Economy’, 2. *Socio-Economic Review* 2010, pp. 211–250.

10 And also former President of the German Constitutional Court.

11 R. HERZOG & L. GERKEN, ‘Stop the European Court of Justice’, *Frankfurter Allgemeine Zeitung* 2008.

12 See CH. U. SCHMID, ‘From *Effet Utile* to *Effet Néolibéral*: A Critique of the New Methodological Expansionism of the European Court of Justice’, in R. Nickel (ed.), *Conflict of Laws and Laws of Conflict in Europe and beyond: Patterns of Supranational and Transnational Juridification* (Antwerp-Oxford: Intersentia, 2010), pp. 295–314; M. Everson, ‘From *Effet Utile* to *Effet Néolibéral*: Why Is the ECJ Harming the Integrity of European Law’, in C. Joerges & T. Ralli (eds), *European Constitutionalism without Private Law*, *ARENA Report Series* (Oslo 2011), p. 41.



Research on the legal and philosophical aspects of ‘justice’ at the European level has gained recent momentum and is dealt with in a number of renowned studies.<sup>13</sup> The focus here is a substantially narrower but not unrelated or uncontroversial one. It examines whether the CJEU, in particular, has overprotected economic mobility and contractual autonomy<sup>14</sup> to the detriment of health care, education, and certain fundamental rights.<sup>15</sup> As the Court has shaped market integration, institutional balances of power, ‘constitutional’ boundaries and thousands of policy outcomes to drive legal, economic, and political integration,<sup>16</sup> it was inevitably going to raise stability concerns in policy areas traditionally subject to the discretion of the nation state.<sup>17</sup> In doing so, such judicial pioneering was equally bound to conform to some transnational notion of

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- 13 Micklitz convincingly argues that the European market state yields its own model of justice, which he terms ‘access justice’. This alludes to the concept that all market participants, including workers, must have a fair and realistic chance to get access to the labour model, as well as to participate from the benefits of the market. See H.W. MICKLITZ, *Social Justice and Access Justice in Private Law*, *EUI Working Paper Law No.2011/02* (Department of Law); H.W. MICKLITZ, *Introduction, The Many Concepts of Social Justice in European Private Law* (Cheltenham: Edward Elgar, 2011), pp. 3–57. For further invaluable reading, see S. WEATHERILL, ‘The Constitutional Competence of the EU to Deliver Social Justice’, 2(2). *ERCL (European Review of Contract Law)* 2006, pp. 135–158. See D. KOCHENOV, G. DE BURCA & A. WILLIAMS, *Europe’s Justice Deficit?* (1st edn, Hart Publishing, 2014); F. DE WITTE, ‘EU Law and the Question of Justice’ (Thesis submitted to London School of Economics and Political Science, June 2012). See D. LECZYKIEWICS & S. WEATHERILL, *The Involvement of EU law in Private Law Relationships* (Oxford: Hart, 2013); S. GRUNDMANN, *Constitutional Values and European Contract Law* (Kluwer Law, 2008); G. BRUGGEMEIER, A.L.B. COLOMBI CIACCHI & G. COMANDÉ, *Fundamental Rights and Private Law in the European Union, Vol. I and Vol. II* (Cambridge: CUP, 2010); T. WILHELMSSON, ‘Varieties of Welfarism in European Contract Law’, 10(6). *European Law Journal* 2014, pp. 714–733. D. SCHIEK, *The EU Economic and Social Model in the Global Crisis: Interdisciplinary Perspectives* (Ashgate, 2013).
  - 14 Important note for the reader: given their acute controversial nature, this article only focuses on Art. 45 TFEU (free movement of workers), Art. 49 TFEU (right of establishment), Art. 56 TFEU (free movement of services), and also the crucial relevant secondary legislation to these Treaty freedoms. For a comprehensive overview on the free movement of goods and their application by the CJEU, see L.W. GORMLEY, *EU Law Free Movement of Goods and Customs Union* (Oxford University Press, 2010).
  - 15 The focus here is clearly shaped towards the question: *what does it do for us?* For an excellent analysis away from the concerns of the substantive outcomes of the judgments discussed here but rather on the overall approach of the CJEU, see R. O’GORMAN, ‘The ECHR, the EU and the Weakness of Social Rights Protection at the European Level’, 12(10). *German Law Journal* 2011, pp. 1834–1861.
  - 16 A.M. BURLEY & W. MATTLI, ‘Europe before the Court: A Political Theory of Legal Integration’, 47(1). *International Organization* 1993, pp. 41–76; A. STONE SWEET *et al.*, *Litigating the Treaty of Rome: The European Court of Justice and Articles 226, 230, and 234* (New Modes of Governance Project (NEWGOV) 2008).
  - 17 S. WETHERILL, ‘Competence Creep and Competence Control’, 23. *Yearbook of European Law*, p. 1.

social justice, however ‘ill-defined’.<sup>18</sup> By examining specific judgments whereby ‘economic’ rights were seen to controversially triumph over measures intended to protect a basic social interest, observations may be had to the more general question: is the Court guilty of *neglecting* the normative objectives of social justice or does it *complement* such ideals *via* its support for a European ‘private law society’?<sup>19</sup>

It will suffice for the purposes at hand to make a broad reference to the normative objectives of social justice itself and an equally broad reference to the primary legal-economic premise said to lie behind the early EU integration process: the ordo-liberal private law society. Although this narration is not entirely innovative,<sup>20</sup> it does provide a solid point of departure to understand and contextualize the rationale behind the judgments at hand.

## 2. Normative Objectives of ‘Social Justice’ and the European ‘Private Law Society’

On the highest level of abstraction, the concept of ‘social justice’ underlying this article incorporates normative individualism<sup>21</sup> with

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18 DE WITTE, ‘EU Law and the Question of Justice’, (Oxford University Press, forthcoming 2015) p. 8.

19 This concept will be explained in more detail in the succeeding section. On a related issue, and important to note at this point, this article does not seek to discuss the conceptual or normative distinction between private law and public law. Nonetheless, the author is in general agreement with Norbert Reich that at least as far as EU law and the constitutional principle of non-discrimination is concerned, the distinction between private law and public law is misguided. See N. REICH, ‘The Impact of the Non-Discrimination Principle on Private Autonomy’, in D. LECZYKIWICZ & S. WEATHERILL (eds), *The Involvement of EU Law in Private Law Relationships* (Oxford: Hart, 2013), p. 253; Micklitz offers a useful foundation for a better understanding of the ongoing transformation process of ‘Nation States’ to ‘Market States’, whereby private law is understood as ‘economic law, covering not only contract and tort, or systematically speaking the continental codification, but also public and private regulations of the economy. H.W. MICKLITZ, *From the Nation State to the Market State: The Evolution of European Private Law (EUI Working Papers, Law 2012/15)*. See also O. CHEREDNYCHENKO, ‘EU Fundamental Rights, EC Fundamental Freedoms and Private Law’, 1. *ERPL* 2006, pp. 23–61.

20 S. GRUNDMANN, ‘The Concept of the Private Law Society: After 50 Years of European and European Business Law’, 4. *ERPL* 2008, p. 558; C. JOERGES, *What Is Left of the European Economic Constitution?* (*EUI Working Paper, Law No. 2004/13*); A. SOMMA, ‘Private Law as Biopolitics: Ordoliberalism, Social Market Economy, and the Public Dimension of Contract’, 76. *Law and Contemporary Problems* 2010.

21 See D. VON DER PFORDTEN, ‘Five Elements of Normative Ethics – A General Theory of Normative Individualism’, 15(4). *Ethical Theory and Moral Practice* 2012, pp. 449–471. For a discussion of ‘normative individualism’ from the perspective of constitutional economics, see S. GRUNDMANN, W. KERBER & S. WEATHERILL, *Party Autonomy and the Role of Information in the Internal Market – An Overview* (Berlin: de Gruyter, 2001). For a recent normative individualistic understanding

elements<sup>22</sup> of teachings by Sen<sup>23</sup> and Rawls.<sup>24</sup> It purports that all legal and political decisions must be justified in the last instance by reference to the individual and derive from a type of impartial deliberative forum.

First, this individual-centred approach does not *de facto* conflict with a more structured and ‘communal’ understanding of social justice. According to Sen, the former conceptualization entails both a negative obligation to ensure non-interference with the *individual’s* normative preference and a positive obligation to guarantee the availability of core entitlements indispensable to each *individual’s* well-being. In both obligations, the ethical justification is essentially made back to the individual. Second, if one stands from behind Rawls’s ‘veil of ignorance’ (without knowing if he/she will be rich or poor, male or female, etc.), each individual may be seen to have an inherent interest in impartially limiting certain freedoms to protect other fundamental rights or the equal availability of basic ‘public’ goods such as food, shelter, health care, and education – taking into due account the least advantaged individuals in the social order.<sup>25</sup> The starting point is shifted from an object-level dispute (i.e., who gets what) to a meta-level

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of fundamental rights, see A.L.B. COLOMBI CIACCHI, ‘European Fundamental Rights, Private Law and Judicial Governance’, in H. Micklitz (ed.), *The Constitutionalism of European Private Law* (Oxford: OUP, 2014).

- 22 Although these renowned philosophers had certain conflicting views (such as Sen’s rejection of Rawls’s transcendental institutionalism for a more realization-focused comparativism), this does not, of course, mean that there is no overlapping consensus. For example, both agreed upon the idea that fairness is central to justice, the objectivity of practical reason, a fundamental concern for liberty, the insistence on ‘the fair equality of opportunity’, and the fact that primary goods should be conceived to protect individual normative preferences. See, for more detail on this, S. MAFFETONE, ‘Sen’s Idea of Justice versus Rawls’s Theory of Justice’, 11(5). *Indian Journal of Human Development* 2001.
- 23 A. SEN, *The Idea of Justice* (London: Penguin, 2009). See DE WITTE, *supra* n. 13, p. 10: where Sen’s theory of justice is used as a ‘useful starting point’ to conceptualize justice ‘beyond the outcome of (national) political processes [...] and in a tiered structure like the Union’. Indeed, this is crucial to complement any use of Rawls’s theory, which is arguably somewhat lacking in a trans- and post-national context.
- 24 J. RAWLS, *A Theory of Justice* (revised edition, Cambridge, Massachusetts: Belknap Press, 1999). For a discussion on the place of contract law in Rawls’s ‘basic structure’, see M. HESSELINK, ‘Five Political Ideas of Contract Law’, 7(2). *ERCL* 2011, pp. 295–313.
- 25 Note, contrary to Rawls, it is not meant here that the basic structure of society which derives from such a hypothetical choice situation is restricted only to the least advantaged members who would be ‘fully cooperating’. It must account for all persons and thus include persons with severe mental and physical disabilities. Admittedly, Rawls does take account of the representation of such persons but only in the ‘legislative phase’ of decision-making. Hence, the difference principle is understood here as more than a principle for just ‘structuring basic economic institutions on grounds of reciprocity’. It is a principle to arrange for a fair allocation of social and economic entitlements and ought to extend to what Sen describes as ‘hard cases’ (i.e., compensation as a result of individual needs or disabilities).

dispute (i.e., what are the appropriate evaluative criterion to determine a system of fair allocation).

Essentially, it may be said that what is required is a proportionate balance between *freedoms* and *limitations* to ensure individual desires, without adversely affecting the distribution of basic entitlements to other individuals within the democratic polity and social order. This explains why the nation state – with political structures of robust contestation entrenched in specific historical and cultural traditions – is central to the realization of ‘social justice’. At the trans- or post-national level, where such structures do not exist, any contribution to the attainment of ‘social justice’ will be distinctive and will subsequently require a distinctive normative perspective.<sup>26</sup> Here, we turn our focus to the introduction of a legal-economic theory known as the ‘private law society’.

This ordo-liberal society, according to Franz Böhm’s seminal analytical conceptualization,<sup>27</sup> is a ‘society predominately based on individual consensus and market transactions’, which generates personal freedom, economic efficiency, and social effects.<sup>28</sup> The promotion of normative individualism and the taming of discretionary politics are core for enhancing resource allocation. This concept requires the protection of private law subjects from the state as well as against the market power of other private law subjects<sup>29</sup> – essentially putting states ‘on equal footing’ with private law subjects. Böhm should not be mistaken for an advocate of a ‘neo-liberalism’ – in his version of a ‘private law society’; the rejection of a *laissez faire* approach is necessitated.<sup>30</sup> A ‘strong state’ is required to build and enforce a legal regime representing an *ordo* intrinsic to economic life, which the

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26 At the EU level, Micklitz aptly explains why and how a different model of justice at the EU level challenges national models of social justice. See MICKLITZ, *supra* n. 13.

27 F. BÖHM, ‘Privatrechtsgesellschaft und Marktwirtschaft’, 17. *Ordo* 1966, pp. 75 *et seq.* See, for a discussion of this in the English language and in the context of the EU, P. MÜLLER-GRAFF, ‘Private Law Society in the Constitution of the European Union’, in M. Faure, J. Smits & H. Schneider (eds), *Towards a European Ius Commune in Legal Education and Research* (Antwerp: Intersentia, 2002), pp. 57–70.

28 GRUNDMANN, 6(4). *ERPL* 2008, p. 558.

29 See *ibid.*

30 The distinction between neo-liberalism and this form of ordo-liberalism is quite an important one. The latter, as Joerges and Rödl point out, is not concerned about the ‘idea of state intervention in itself’ but the ‘fundamental character of state intervention’. Although both neo-liberalism and ordo-liberalism enhance the role of private actors, the former is less moderate and places more stress on deregulation and *laissez faire* state policies. The concept of ‘the private law society’ is also distinct from the post-war German notion of the ‘social market economy’ (as coined by Muller-Amarack), which is arguably more neo-liberal in practice. This article respectfully contests Soma’s grouping of ordo-liberals, neo-liberalism, and the social market economy as the same formula, whereby in all cases the ‘regulation of private relations has to ignore redistribution’. See A. SOMA, ‘At the Roots of European Private Law: Social Justice, Solidarity and Conflict in the Proprietary Order’, in H.W. Micklitz (ed.), *The Many Concepts of Social Justice* (Cheltenham: Edward Elgar, 2011), p. 187.

political system must respect. This is largely based on the assumption that political opportunism is a real undermining threat to normative neutrality.

According to this line of thought, the fact that State intervention must to be justified *in light of* the normative framework to ensure the functionality of private law mechanisms does not mean it will result in a society that weakens the delivery of mandatory (national) public goods. Here, an economy that operates above the quarrels of politics is assumed to acquire more stability and effectiveness, increasing potential resource allocation *via* suitable taxation and thus complementing redistributive social policies (higher health care and education standards, increased welfare benefits, etc.).

It is not difficult to see why the concept of the ‘private law society’ is appealing for scholars who seek to understand the *raison d’être* or foundations of legitimacy for European integration. German *ordo-liberal* thinking undoubtedly influenced the creation of the European Economic Community.<sup>31</sup> The open market (and thereby private autonomy<sup>32</sup>) was seen as a basic tool not only to enhance resource allocation (prosperity) but also to functionally enhance interdependency (peace) and reduce the role of discretionary state politics (supranationalism). The concept of the European ‘private law society’<sup>33</sup> requires that fundamental freedoms and competition rules are cast in constitutional stone away from the follies of national politics and powerful private actor interference.<sup>34</sup> Muller Graff insists that the ambit of the fundamental freedoms is understood

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31 For an analysis of the European Economic Constitution, see H. COLLINS, *The European Civil Code: The Way Forward* (Cambridge: CUP, 2008), p. 91. For further reading, see C. JOERGES, ‘A Renaissance of the European Economic Constitution?’, in U. NEERGAARD, R. NIELSEN & L.M. ROSEBERRY (eds), *Integrating Welfare Functions into EU Law: From Rome to Lisbon* (2009), p. 29; H. MICKLITZ *The ECJ between the Individual Citizen and the Member States – A Plea for Judge-Made European Law on Remedies* (EUI Working Paper, Law 2011/15), p. 6.

32 See, for an overview of the role of EU law in private relations, LECZYKIWICZ & WEATHERILL, *supra* n. 13.

33 See MULLER-GRAFF, ‘Europaisches Gemeinschaftsrecht und Privatrecht – das Privatrecht in der europäischen Integration’, *NJW* 1993, where he convincingly argues that there is a presumption for a ‘private law society’ (*Privatrechtsgesellschaft*) under the EC Treaty. This presumption was refined by the ECJ in the famous *Cassis de Dijon* decision. On this, see GRUNDMANN *et al.*, *supra* n. 21.

34 See GRUNDMANN, *supra* n. 20. In this respect, Grundmann recognized (i) the protection of the ‘private law society’ against state power in three instances at the EU level: against intra-economic activity by subjecting it to the same standards of competition law as private party activity, against supplying additional funds to market players – namely in the form of state aids and public contracts, and against legislative action by subjecting it to the demanding case law on fundamental freedoms; (ii) the protection of the ‘private law society’ against private power, namely cartels and dominant positions (via competition law and the horizontal effect of fundamental freedoms); and (iii) the potential protection of the private law society against other structural imbalances between private parties (via anti-discrimination rules and consumer protection rules).

broadly: extending to all types of contracts, all types of parties and players (Member States, Community, private law subjects), and all types of obstacles, explicit or not, direct or indirect.<sup>35</sup> This broad reach of economic mobility meets its limits in the form of measures that are required to achieve mandatory social objectives.<sup>36</sup> As Joerges and Rödl point out, this European ordo-liberal polity has a two-fold structure (at least in theory).<sup>37</sup> At the supranational level, it is committed to economic rationality and a system of undistorted competition. At the national level, redistributive policies are pursued and realized.<sup>38</sup> It is the interaction between these structures and the controversial application of the mobility provisions therein that is of fundamental interest to the study at hand.

The succeeding sections examine the substantive outcome of CJEU judgments on certain economic mobility rights in the field of health care (s. 3), education (s. 4), and fundamental rights protection (s. 5). Finally, it will identify the degree of conformity between the decisions and Bohm's normative framework of the private law society and thus the subsequent degree of (dis)engagement the Court has with the more general objectives of 'social justice' in the aforementioned policy domains.

### 3. Health Care

Given the abstract concept of 'social justice' above, health care clearly entails a double obligation for the state. On the one hand, it is a vital, fundamental entitlement that must be equally available to each individual (positive obligation). Few rights are worthy of protection if one is expected to suffer severe pain or a premature death. On the other hand, health care is not only about treatment

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35 See MULLER-GRAFF, *supra* n. 33. See GRUNDMANN *et al.*, *supra* n. 21. This broad understanding fits neatly into Micklitz concept of *access justice*.

36 These are what Theodore Lowi describes as the most 'political' of policies: mandatory public policy rules (market breaking). On this, see C. JOERGES & F. RODL, *Social Market Economy as Europe's Social Model?* (EUI Working Paper, Law No. 2004/8).

37 Joerges and Rodl claim that the old economic constitution inspired by ordo-liberal ideals was all but eroded during the third phase of the European integration process: the turn to governance and the erosion of the rule of law. The author here does not believe that this statement holds true at all levels of EU integration and intends to evidence this with regard to the CJEU decisions examined herein. However, on a related note, the author largely agrees with Joerges and Rodl's criticisms of the term 'social market economy' adopted in the Lisbon Treaty. This article will not discuss the value (or otherwise) the insertion of the term 'social market economy' may have as a model for Europe. However, given the close connection between this concept and that of the 'private law society' examined here, inevitable conclusions may, of course, be drawn as to whether the substantive outcomes of certain CJEU decisions may fit within the ideals of a potential 'social market economy'.

38 JOERGES & RODL, 'Informed Politics, Formalised Law and the Social Deficit of European Integration: Reflections after the Judgements of the ECJ in Viking and Laval', 15(1). *ELJ* (*European law Journal*) 2009, pp. 1-19.



required for one's survival and basic well-being. It encompasses the right to be free to acquire a particular treatment in a particular clinic as an expression of one's normative preference and contractual autonomy (negative obligation). Therefore, in order to attain or at least aspire to attain 'social justice' in this policy area, a suitable balance must be struck between these obligations.

To meet demands and provide for the less wealthy individuals in society, all European states – to a better or worse degree – provide for universal access to a wide range of medical treatments. This is financed by compulsory collective insurance (either by taxation or mandatory premiums) through which citizens insure themselves. Thus, the costs are essentially borne by the citizen. In order to ensure the delivery of its *positive* obligation to provide basic health care, the state must, and in a sense from behind a veil of ignorance, establish certain limitations on its *negative* obligation. Limits may be placed on permitting a particular treatment, on the choice of provider or on the type of treatment one may be reimbursed for within the state (internal limitation) or outside the state (external limitation). Certain restrictions are to control costs and to avoid, as far as possible, any waste of financial, technical, and human resources to ensure sufficient access to health care within the territory of the state. Throughout the Union, health care has an almost iconic status as a territorially bound state commitment. As evidenced below, any 'creep' of Europeanization, especially *via* 'economic' rules and contractual autonomy, into this sensitive policy domain represents a potent challenge.

### **3.1. *Free Movement of Services and Patient Mobility***

The EU has only residual competences in the field of health, by virtue of Article 168 of the Treaty on the Functioning of the European Union (TFEU). This limited legal basis has allowed for the adoption of support programs and the delimitation of competence of certain EU bodies and agencies. Although the Court frequently confirms that the organization and delivery of health care is the responsibility of the Member State, it is equally acknowledged that where goods and services are traded, there is scope for EU internal market rules. In particular, the application of Article 56 TFEU on services and secondary legislation on social security entitlements for the economically active and their families<sup>39</sup> has been and will continue to be cautiously observed by many national policymakers and actors.

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39 Council Regulation (EEC) No. 1408/71 of 14 Jun. 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community. This Regulation has been modified at least 30 times, the last important modification extending its personal scope to cover nationals of non-Member States legally residing within the EU; see Council Regulation (EC) 859/2003 of 14 May 2003, *OJ L* 124/1. It has recently been codified and repealed by Regulation (EC) 883/2004 of 29 Apr. 2004, *OJ L*

Early in the 1980s, the Court acknowledged the economic nature of private health care providers.<sup>40</sup> However, the *Kohll* and *Decker* rulings of 1998 established for the first time the ‘economic’ dimension of health care that is provided by statutory reimbursement and social security systems. Despite the Court recognizing the specific nature of health care (i.e., the need for positive welfare entitlements to be aggregated and sustained by the national welfare state), it did not agree to remove it from the ambit of free movement rules. In subsequent judgments, the Court further clarified that neither the specific type of statutory cover (be it reimbursement, benefit-in-kind, or national health service) nor the specific type of health service (hospital or non-hospital) will alter the economic nature of the health service in question.

Regarding the EU economic freedoms, three different normative dimensions underlie the individual’s right to health care.<sup>41</sup> The first dimension is the individual’s need for *emergency care while abroad*. This is rather uncontroversial and full reimbursement of the costs must be paid by the State of affiliation (i.e., the state where he is a financial contributor to the insurance fund) *via* the European Health Insurance Card.<sup>42</sup> The second dimension occurs in *exceptional* circumstances, whereby the individual patient cannot receive the medical treatment his/her condition requires within the State of affiliation. The third dimension of the individual’s right to health care, and notably the most controversial with regard to reimbursement, is based purely on *patient choice*. The next section will address these latter two dimensions in more detail, given that they involve ‘planned’ cross-border care and are thus more controversial. All cases set out below deal with scenarios whereby the patient and a foreign health service provider have completed an arrangement for certain medical treatment, and the patient subsequently returns to seek reimbursement for the costs of the said treatment off his/her home state.

### 3.2. *The Right to Reimbursement for Treatment Abroad out of Medical Need*

In *Geraets-Smits and Peerbooms*,<sup>43</sup> two Dutch residents requested reimbursement from their national insurance funds for the costs of treatment that could not be

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166/1. Since all the legislative and judicial developments of the present contribution refer to Regulation 1408/71, references will be made to this legislative instrument. For an in-depth analysis of the role of European law and policy on health systems in Europe, see the edited volume E. MOSIALOSS *et al.*, *Health Systems Governance in Europe* (Cambridge: CUP, 2010).

40 See C-286/82 and 26/83 *Luisi Carbone* [1984] ECR 377 and later C-159/90 *Grogan* [1991] ECR I-4685.

41 See DE WITTE, *supra* n. 13, p. 74. See also W. PALM & I.A. GLINOS, ‘Enabling Patient Mobility in the EU: between Free Movement and Coordination’, in E. Mosialoss *et al.* (eds), *Health Systems Governance in Europe* (Cambridge: CUP, 2010), p. 509.

42 Article 19, Regulation 883/2004.

43 C-157/99 *Geraets-Smits and Peerbooms* [2001] ECR I-5473.



provided in the Netherlands. Prior authorization for such reimbursement was subject to the fulfilment of two conditions. First, the treatment must be sufficiently recognized as ‘normal’ in scientific circles or standards in the Netherlands. Second, suitable treatment could not be provided in the Netherlands without undue delay. Mrs Geraets-Smits suffered from Parkinson’s disease and undertook multidisciplinary treatment in Germany. Her request for reimbursement of the costs was rejected on the grounds that satisfactory treatment could be obtained in the Netherlands without undue delay. Mr Peerboom lapsed into a coma after a traffic accident where he was transferred to Austria to undertake intensive neuro-stimulation therapy. His reimbursement was also rejected on the above ground and, furthermore, the therapy in question was not regarded as ‘normal within the professional circles concerned’ – note, exclusively circles in the Netherlands. The Court held that the prior authorization measure that only applied for treatment received abroad constituted a restriction on the patients’ freedom to receive services (now Art. 56 TFEU). However, it also held that prior authorization for the assumption of costs for hospital treatment may indeed be the only reasonable and necessary measure to protect public health.

The Court then listed a number of overriding reasons that may justify the restriction – the risk of seriously undermining a social security system, the attainment of a high level of health protection, and/or the maintenance of treatment capacity or medical competence on national territory. However, it was equally recognized that such vital objectives are indeed only that, objectives. They say nothing about the proportionality of the *measure* that is in place to secure the objective. Therefore, it was held that the actual conditions of prior authorization must not exceed what is necessary for that purpose and that the same result cannot be achieved by less restrictive rules.<sup>44</sup> In order for a prior authorization scheme to be justified, ‘it must, in any event, be based on objective, non-discriminatory criteria which are known in advance, in such a way as to circumscribe the exercise of the national authorities’ discretion, so that it is not used arbitrarily’.<sup>45</sup> Regarding the first condition that the proposed treatment must be ‘normal’, it was held that any such evaluation must take into account the findings of international medical science. For the condition concerning ‘suitable treatment without undue delay’, the national authorities are required to consider all circumstances of each specific case and to take due account not only of the patient’s current medical condition but also his/her past medical record.

In *Inzian*,<sup>46</sup> the rather complicated parallel legal route available for individual patients under EU law was somewhat clarified. This confusion involved

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44 *Ibid.*, para. 75.

45 *Ibid.*, para. 90.

46 C-56/01 *Inzian* [2003] ECR I-12403.

the relationship between Article 56 TFEU on services and Regulation 1408/71 on social security coordination, which the Court recognized as symbiotic. The aforementioned secondary legislation puts in place a coordination mechanism that gives its beneficiaries the right to receive sickness benefits in kind in a state other than the one in which they are insured. These benefits are provided in accordance with the legislation of the providing state, as if the person concerned was insured there, at the expense of the state of affiliation. Thus, the state in which the individual contributes to the social security scheme must cover the costs. Note that although the said state pays for the treatment, it also retains control over whether to authorize it (now Art. 20(1) of Regulation 883/2004). This ‘control’ is not unlimited. Authorization may not be refused when the treatment is (i) covered by the health system in the state of affiliation and (ii) cannot be given to the patient within a medically justifiable time limit. The patient may rely directly on these provisions by requesting an E 112 form to travel abroad for such treatment. Alternatively, the patient may rely on the Treaty-based legal route. The freedom to receive medical services does not preclude prior authorization either but equally subjects the granting of that authorization to the condition that the patient could not receive appropriate treatment (included in the national benefit package) to his or her condition without undue delay in the state of affiliation. Essentially, the two routes do not contradict each other; however, there are greater benefits for relying upon Regulation 883/2004. This route guarantees the patient full reimbursement of the costs, and he does not have to pay in advance to fall within the material scope of the Treaty-based freedoms.

In *Watts*,<sup>47</sup> a UK national suffered from arthritis of the hip. After the diagnosis was made, she had to wait for over a year before such treatment could be offered within the United Kingdom, leaving her mobility severely hampered and in constant pain.<sup>48</sup> She had been denied approval for an E 112 form on two occasions and subsequently travelled to France to receive the treatment, at her own costs, substantially sooner (where she was treated in less than one month). The English High Court acknowledged that due to her condition, she was wrongfully refused an E 112 when she applied the first time and should not have been initially put on a 12-month waiting list. However, it continued to opine that as she was reassessed six months after that decision, and her waiting time was corrected to only four months from that second decision onwards, then she could not claim the treatment was unduly delayed.

On the one hand, it held that a 12-month waiting period was unacceptable given Ms Watts’ condition and that she should have been treated within four months. On the other hand, two separate waiting periods (the six months before the reassessment and the four after), totalling a ten-month period of ‘severe pain’,

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47 C-327/04 *Watts* [2006] ECR I-4325.

48 *Ibid.*, para. 24.

were deemed to be acceptable. Essentially, the English Court held that as the relevant national authority got it right the second time (two months too late, followed by a further four-month waiting period), Ms Watts could not claim the delay was ‘undue’. The CJEU entertained no such claims and restated that any conditions for prior authorization (*in casu*, waiting lists) must not exceed an acceptable period on the basis of an objective medical assessment of the individual’s clinical needs, in light of all factors characterizing his/her medical condition. This obligation cannot be avoided purely because the claimant was wrongfully refused an E 112 on the first time of asking.

Arguably, in elaborating the conditions under which patients are allowed to seek treatment abroad to compensate for the failures of their own state’s medical system, the Court is seeking to prevent instances that constitute a violation of the citizens’ fundamental right to access safe and high-quality health care. Such intentions are potently evident in the more recent *Elchinov*<sup>49</sup> decision. A Bulgarian national covered by (and contributing to) the national health insurance fund of his home state was diagnosed with a malignant oncological disease (a cancer) of the right eye. On the advice of his doctor, the patient travelled to Berlin in order to obtain specialized treatment that was not available in Bulgaria. Indeed, it was acknowledged that the only actual treatment available in Bulgaria was the removal of the eye. Thus, he applied to the national fund to cover the costs for treatment in a highly specialized clinic in Berlin. In light of the pressing circumstances, he travelled abroad without waiting to receive authorization from the national authorities. Upon returning to Bulgaria (with two eyes and complete eyesight intact after successful treatment in Berlin), Mr Elchinov sought reimbursement for the costs. His application was rejected on the grounds that the ‘treatment was not one of the benefits provided for by Bulgarian legislation.’ On appeal to the Supreme Administrative Court, it was held that such a refusal was in accordance with Regulation 1408/71 as the treatment in question was an advanced therapy not available and thus not covered by the national health insurance in Bulgaria. Indeed, the exact type of treatment (attachments of radioactive applicators or proton therapy) was not included in the list of national benefits.

However, Bulgarian law did provide for a general set of clinical treatments, which the latter may indeed fall within, such as ‘other operations on the eyeball’ and ‘high-technology radiotherapy for oncological conditions’. In respect to this issue, the Court has already held that it is not, in principle, incompatible with EU law for a Member State to establish exhaustive lists of the medical benefits reimbursed under its social security scheme and that that right cannot have the

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49 C-173/09 *Elchinov* [2010] ECR I-08889.

effect of requiring a Member State to extend such lists of medical benefits.<sup>50</sup> Nonetheless, it held that in deciding whether a particular treatment is included in the national benefits, if the legislation does not expressly and precisely stipulate the method of treatment applied (and cannot offer alternatively effective treatment with undue delay), the national authorities must apply the usual principles of interpretation to the relevant *general* categories of treatment listed on the basis of objective and non-discriminatory criteria. This must take into account the pathological condition of the patient, including the nature of the disease and the degree of pain. The national authorities cannot presume that specific treatment is not included in the list of national benefits simply because it is not available in that territory. Hence, Member States have to reimburse treatment considered vital for the patient's physical integrity and which is *generally* included in the national benefits but cannot be provided at home.

Before moving onto an analysis of the effects these decisions have on the attainment of 'social justice' in health care, an even more controversial patients' rights claim based solely on normative preference must be examined.

### **3.3. *The Right to Reimbursement for Treatment Received Abroad out of Choice***

In *Kohll*,<sup>51</sup> a doctor from and based in Luxembourg preferred for his daughter to get orthodontic braces across the border in Trier, Germany. His request for reimbursement of the costs incurred was rejected 'on the grounds that the proposed treatment was not urgent and that it could be provided in Luxembourg'. Although this did not mean Mr Kohll was prohibited from approaching an orthodontist in Germany, it did mean, as the provider was not established in Luxembourg, that he would have to cover the costs himself. Having accepted that this may indeed deter one to avail of the service abroad, the Court deemed it a restriction to free movement and subjected it to justification. The public interest behind such restriction is to provide a balanced medical and hospital service accessible to all within the state. Six Member State governments observed that prior authorization constitutes the only effective and least restrictive mean of controlling expenditure on health and balancing the budget of the social security system.

The Court accepted that a measure to exclude the risk of seriously undermining the financial balance of the social security system would be permitted in the public interest. Nonetheless, under European free movement rules, such a restriction must be objectively justified. This means that the actual conditions of the prior authorization in question must be effective and necessary in controlling expenditure on health. It must be proven that claims such as Mr

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50 See, to that effect, *Gereats-Smits and Peerbooms*, *supra* n. 43, para. 87.

51 C-158/96 *Kohll* [1998] ECR I-1931.

Kohl's have significant effects on the financing of the national system. Mr Kohl argued that the financial burden on Luxembourg's social security system is non-existent, both in principle and in practice, since he is an 'insured person' under the Luxembourg union of health insurance and the medical expenses are requested at the same rate as applied in Luxembourg. Thus, reimbursement in accordance with the tariff of the state of insurance could not lead to higher financial burdens, since the treatment (provided at home or abroad) would have to be refunded to the exact same amount regardless (which is, in any case, set by the home state). Given that no authorization was required for the same treatment provided at home, the rule in question could not be justified by the need to control health expenditure.

In *Muller-Fauré and Van Riet*,<sup>52</sup> the Court again acknowledged that the right to seek health care abroad out of *choice* based on Article 56 TFEU may be restricted by prior authorization justified on grounds of public health. However, a measure that is not based on fear of wastage resulting from hospital overcapacity but solely on the ground that there are waiting lists on the national territory for the hospital treatment concerned, without account being taken of the specific circumstances attached to the patient's medical condition, cannot amount to a properly justified restriction on freedom to provide services.<sup>53</sup> In any case, this right to seek health care abroad at no point allows for full reimbursement of the costs but only up to the level that would have been granted had the treatment taken place at 'home'.

The recently adopted Directive on patients' rights in cross-border health care ('PRD')<sup>54</sup> largely codifies the Courts' attempts, outlined above, to secure a type of solidarity in protecting the patients' right to choose. Such freedom may only be limited to protect access to high-quality health care in the state of affiliation and the patient in any case will only be reimbursed up to the costs of equivalent treatment in the state of affiliation. The next section will contain a critical analysis of all the above decisions in light of the broader objective of this study.

### **3.4. Reflections on the Judicial Interpretation of the Economic Freedoms and 'Social Justice' in Health Care across Europe**

Do the above decisions, addressed in sections 3.2 and 3.3, represent European judicial activism disabling the state's capacity to provide for basic health care? Or, are they in accordance with the broad objectives of 'social justice'?

First, all of the aforementioned decisions evidence the Court's preference for normative individualism. It has ruled in a mantra-like fashion that any

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52 C-385/99 *Muller-Fauré and Van Riet* [2003] ECR I-4509.

53 *Ibid.*, paras 90, 92, and 109.

54 Directive 2011/24/EU on the application of patients' rights in cross-border health care.

restriction on the patient's contractual freedom to receive a medical service, such as the conditions on prior authorization, must take into account the directly concerned *individual's* medical needs. In *Watts* and *Elchinov*, the Court has used the economic freedoms and the relevant secondary legislation to compensate for the failures of national health systems and entitle the patient to seek the required treatment abroad. The demand for 'undue delay' and 'effective treatment' have granted the individual a right to adequate care whenever a treatment option can be construed to fall within the 'basket of health care' in the state of affiliation but *cannot* be provided in its territory. This situation arises only in extreme and exceptional circumstances. Eurostat data suggests that the unmet need of health care is very limited within the EU.<sup>55</sup> Furthermore, there is evidence that this line of case law has managed to partially *help* Member States meet their *positive* obligation (i.e., provide for basic health care). Empirical research shows that Member States have used the rationale behind these decisions to compensate for the lack of financial and technological resources required to treat rare diseases<sup>56</sup> or to balance negative externalities between the supply and demand of health care at the border regions.<sup>57</sup>

As for the decisions in *Kohll* and *Muller-Fauré* concerning the receipt of medical services as an expression of patient *choice*, national governments brought forward two general arguments premised upon their positive obligation to protect immobile citizens. One argument is based on the infrastructural stability of the health care system of affiliation, while the other relates to the financial stability of the said system.

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55 See Table 8.1, Commission Impact Assessment for the Directive on Cross-Border Healthcare, SEC (2008) 2163, p. 68.

56 As noted by DE WITTE, *supra* n. 13, p. 95, 'Malta and Luxemburg, for example, simply outsource treatment of such patients to other systems, which frees up resources for other treatments. Likewise, it allows less rich Member States to offer treatment options that are (for the moment) unavailable at home'. See also Opinion of AG Villalón in *Elchinov* [2010], para. 72: 'a system such as the Bulgarian system, which seeks to offer a very advanced list of treatment that is paid for by the fund, benefits from the knowledge and technology of other Member States which have the technical resources to which Bulgaria aspires. If a Member State wishes to be at the cutting edge of medical treatment (which naturally takes time), European Union law allows its citizens to receive in another Member State treatment which the former State wishes to make available domestically, although not at present in a position to do so'.

57 Commission Impact Assessment for the Directive on Cross-border Healthcare, SEC (2008) 2163, p. 42: 'Belgium has had larger patient flows for planned care than most other Member States, in particular with Dutch patients being treated in Flanders through contracts between Dutch health insurers and Belgian providers. In this case study, the researchers consider that as well as being convenient for patients, this is more efficient for both the Dutch insurers (providing care that is faster and cheaper, as well as being perceived as technologically advanced and of high quality) and the Belgian providers (helping to overcome overcapacity in the acute hospital sector by treating patients from abroad)'.

The infrastructural argument assumes that increased patient mobility will result in a waste of resources and cutbacks in cost-intensive treatments, leaving ‘immobile’ patients in the state of affiliation worse off.<sup>58</sup> This is a legitimate concern, but in order to be a justified exception to free movement rules, it must be objectively and empirically demonstrated. Indeed, this may be difficult, but a fair assessment can ultimately be based on the number of mobile patients. The Commission recently estimated that only 1% of the total Gross Domestic Product of the EU is spent on cross-border health care, as the number of cross-border patients remains extremely low. In context, approximately EUR 9.7 billion of a total EUR 12,149 billion is spent on such health care.<sup>59</sup>

The second argument regarding financial stability assumes that patient mobility will destabilize access to adequate treatment for all citizens by producing financial asymmetries. First, this argument is conceptually flawed. The Court has reiterated on numerous occasions that in the case of patients who *choose* treatment abroad, the Member State of affiliation is only required to reimburse costs up to the same amount had the treatment taken place in its territory. Any costs above this threshold are borne by the patient. Thus, as the patient contributes to the funding of the collective insurance scheme and becomes a beneficiary of that scheme at no extra costs, there can be no logical reasoning to assume that the financial stability of the health care system is suddenly under threat. Second, there is no empirical evidence as of yet that the financial stability of national distributive choices has been negatively affected. National actors argue that financial instability may be difficult to prove until it is too late; they fear a drop may become a flood. However, as it stands, there exists empirical evidence to the contrary – the number of cross-border patients is extremely low and moderate estimates suggest that patient mobility is financially advantageous for the Member States.<sup>60</sup> This goes some way to explaining the difficulty in identifying the adverse effects repeatedly warned by such national actors. Indeed, a drop *may* become a flood in the future, but without signs of becoming even a stream such arguments appear nothing more than hyped speculation.

Essentially, the economic freedoms have protected the individual right to receive adequate health care free from unjustifiable restrictions, without so far

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58 See DE WITTE, *supra* n. 13, p. 97.

59 In a national context, between 2001 and 2006, the United Kingdom spent approximately GBP 2 billion on cross-border care, while during that same period it spent an estimated GBP 4 billion on overpaid benefits due to official mistakes. See E. VAN GINNEKEN & R. BUSSE, ‘Cross-Border Health Care Data’, in M. Wissmaer, W. Palm *et al.* (eds), *Cross-Border Health Care in the EU: Mapping and Analyzing Practices and Policies, Observatory Studies Series* (2008), p. 310; and see annual rates regarding *Estimates of Fraud and Error Levels in the Benefit System in Great Britain*, National Statistics by the Department of Work and Pensions, UK government publications. See [www.gov.uk/government/publications](http://www.gov.uk/government/publications).

60 See Commission Impact Assessment, *supra* n. 57, pp. 34 and 55.



disrupting the positive obligation to ensure a universally accessible health system. Note that the Court has also refrained from imposing any positive obligations upon the Member States. National policymakers retain the regulatory autonomy to decide whether or not to reimburse particular costs for treatment. However, if they decide to offer reimbursement for certain treatment *within* the state of affiliation, they cannot deny reimbursement should that treatment be provided outside the state of affiliation.<sup>61</sup> The above decisions on health care and the economic freedoms demonstrate that the Court has aided, by utilizing financial and technological resources, the balance between the *negative* and *positive* obligations of social justice in this area.

#### 4. Education

In accordance with the above conception of ‘social justice’, the delivery of education, just like health care, entails a double obligation. On the one hand, it is a vital human entitlement that must be equally available to each individual. Here we see the *positive* obligation on the State. It links the individual to general societal development, generating across the board welfare and human well-being. On the other hand, it develops the individual’s identity and self-determination, enabling him/her to pursue his/her normative preferences. Hence, there also exists a *negative* obligation to ensure that such individual desires remain free from disproportionate interference.

In the field of education, there may be limitations on the choices that the provider and the recipient of education services can make, limitations on who can run schools (public or private), limitations on who receives the award of study grants, and so on. Such measures reflect the state’s interest in maintaining the continuity, universality, and high quality of education services within the territory. Thus, in order to ensure the delivery of its *positive* obligation, the state must impose certain limitations upon its *negative* obligation. In this regard, we can identify three general individual claims to education: (i) the right to access compulsory education (primary and secondary levels), (ii) the right to access tertiary education, and (iii) the right to receive education-related financial assistance.

Although the Union has very limited competence in the sphere of education, this does not mean that the Member States retain full autonomy over the structure of their education policies. As with health-care policies, the effects of European ‘economic’ rules on the attainment of ‘social justice’ in national education policies are not uncontroversial. In this regard, brief attention will also be paid to the role played by non-economically active migrants, namely tertiary students.

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61 Case C-8/02 *Leichtle* [2004] ECR I-2641, para. 48.



#### 4.1. *Education and Economically Active Migrants*

Up until the 1960s, Member States retained complete autonomy in deciding whether, and under which conditions, to grant migrant workers access to their educational facilities.<sup>62</sup> However, the introduction of Regulation 1612/68,<sup>63</sup> to ensure the worker is guaranteed the possibility of improving his living and working conditions and promoting his social advancement, requires equal treatment of economically active migrants and national workers with regard to ‘social and tax advantages’. This explicitly includes educational benefits, both for the worker (Art. 7(3)) and for his/her family members (Art. 12). Part of this Regulation (Art. 10 and Art. 11) was amended by Directive 2004/38, which contains a general and unconditional equal treatment clause for migrant workers and their family members. Combined, these provisions grant such persons equal access to the three general individual rights listed above, access to compulsory education, access to tertiary education, and access to related financial benefits. A migrant worker and his children acquire these social entitlements to education from the moment the worker starts his employment. Thus, in all cases discussed in this section, once an EU citizen has exercised his/her contractual autonomy to enter into an employment agreement in the host state, the public law rules in that host state must non-discriminately protect that worker and his/her children accordingly.

In *Casagrande*,<sup>64</sup> the aforementioned secondary legislation was held not only to allow migrant children access to education but also *all* related study grants to which the child of a national worker is entitled. This was a clear teleological interpretation of the rules in order to ‘enable such children to attend these courses under the best possible conditions’. In *Echternach and Moritz*,<sup>65</sup> two migrant children were refused study grants in the Netherlands. In the first case, the child of a German migrant worker, who had received his entire primary and secondary education in the Netherlands, sought a study grant to continue his studies there. At that time, his father had ceased working in the Netherlands and the whole family returned to Germany. Due to a refusal by the German authorities to recognize his Dutch diplomas, the child returned to the Netherlands only to find that his claim for a grant to study there had been rejected. The Dutch authorities refused his application on the grounds that he no longer retained the status of a family member of a worker under Regulation 1612/68. However, the Court rejected this reasoning and stated that the child must be considered to

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62 A.P. VAN DER MEI, *Free Movement of Persons within the European Community* (Oxford: Hart, 2003), p. 347.

63 This was recently codified by Regulation 492/2011 on Freedom of Movements of Workers within the Union.

64 Case 9/74 *Casagrande* [1974] ECR 773.

65 Cases 389-390/87 *Echternach and Moritz* [1989] ECR 723.

retain the status of a ‘worker’s child’ (and therefore receive the grant) in order to protect his integration into the society. It refused to allow the child to suffer adverse consequences (no further education in the host state or the home state), solely because his father, who was a net contributor to the host state’s taxation system, had returned to his home state. In the second case, the Court precluded the Dutch authorities of evading the obligation to grant equal study benefits to the child of a worker, merely because his father occupied a post governed by special statute under international law (regarding the European Space Agency). In such a case, the child is deemed to fall within the ambit of the Regulation.

In *Di Leo*,<sup>66</sup> the daughter of an Italian migrant worker, who was employed in Germany for over 18 years, had been refused a study grant for pursuing a course outside of Germany. This was due to German rules that stated that the grant applied for was only to be awarded to either German citizens or EU citizens who were not seeking to use it in their country of origin. As she sought to study medicine in Siena, her application was refused. The Court rejected this and stated that if the host State decides to offer a grant to pursue studies abroad to its own nationals, the children of a migrant worker should benefit from the same advantage, even if the courses are in his/her state of origin.

The well-known *Baumbast*<sup>67</sup> case involved two decisions given by the United Kingdom (UK) Immigration Tribunal refusing residence permits for the parents of children who fell within the scope of Regulation 1612/68. Mr Baumbast was a German national who had been working on and off for a period of five years in the UK. He moved there in 1990 with his Colombian wife and two children (who are dual Colombian and German citizens), and the whole family subsequently received five-year residence permits. In 1996, the application to extend their permits was refused. On appeal, Mrs Baumbast was granted leave to stay until her children finished education. Mr Baumbast’s application, however, was not overturned by the Immigration Appeal Tribunal. The second claimant in this case, Mrs R, was a US citizen who moved to the UK with two children as the spouse of an EU worker exercising his free movement. She was granted a five-year residence permit. Two years after arriving however, she got divorced, but the father continued to live nearby in the UK and play a prominent role in the children’s lives. Most relevantly for this part of the analysis, both children were enrolled in education. Having reapplied for an extension after five years, her application was refused as the Secretary of State was not satisfied that the family situation was so exceptional to justify the exercise of his discretion. In his view, ‘the children were young enough to adapt to life in the United States if they had to accompany their mother there’.

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66 C-308/89 *Di Leo* [1990] ECR I-4185.

67 C-413/99 *Baumbast* [2002] ECR I-7091.

In both cases, the claimants invoked their rights under Regulation 1612/68 and also Article 8 of the European Convention on Human Rights (ECHR) on the right to family life. The Court held that the child of a migrant worker is entitled to reside in the host state in order for the child to attend general education courses even if the parents get divorced and/or the only parent who had qualified as a migrant worker had ceased his/her economic activity. The Court explicitly referred to the ‘spirit’ of the Regulation, which is to facilitate the workers’ family from a ‘human point of view’ in compliance with the principles of ‘liberty’ and ‘dignity’. Furthermore, the Court explicitly confirmed that Regulation 1612/68 must be read in light of the fundamental right to private and family life (Art. 8 ECHR). Thus, Article 12 of the said secondary legislation implies that children ‘installed’ in the host state are to be accompanied by the primary carer and that person is able to reside in the host state in order for the child to complete his education successfully.

The recent ruling in *Teixeira*<sup>68</sup> further highlights the individualist stance taken by the Court with regard to the child’s right to education under Regulation 1612/68. Ms Teixeira was a Portuguese national who moved to the UK as the spouse of a migrant worker. Her daughter was born in the UK and spent her entire education there. For over 14 years, she worked various jobs, but after getting divorced and falling unemployed, she subsequently sought state housing benefits for the homeless. This was rejected as she had not been authorized a residence permit (a precondition for such benefits). The Court reiterated its stance in *Baumbast* that the above-mentioned Regulation is designed to ensure the child of a migrant worker pursue his education in the host state under the ‘best possible’ conditions and to be accompanied by his primary carer. This right is acquired once the child is ‘installed’ in that state (i.e., has started his/her education) and does not cease merely if his/her parent becomes economically inactive. Moreover, it was held that such a right could not be dependent on having adequate sickness insurance or sufficient resources not to become a burden on the state.<sup>69</sup>

#### **4.2. Education and Non-economically Active Migrants**

As the focus of this article is on claims made against the Court’s interpretation of the economic freedoms, this section will only briefly touch upon the role of non-economically active migrants (specifically, students who travel abroad purely to seek tertiary education). Each of the cases below involves a scenario whereby a student has exercised his contractual autonomy to enter into an agreement to attend a particular third level educational institution. Given that the relevant

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68 C-480/08 *Teixeira* [2011] ECR I-1107.

69 These are the conditions laid out in Art. 7(3) Directive 2004/38 in order for economically inactive citizens to acquire a right of residence beyond three months.

decisions here were premised upon the principle of non-discrimination and the concept of citizenship,<sup>70</sup> they cannot be accused of abusing the economic provisions in the strict sense. Nonetheless, hardened EU opponents may subscribe to the view that citizenship and non-discrimination are applied by the CJEU in such scenarios only to enhance market efficiency and comparative advantage (perhaps in support of *effet neoliberal* claims). Indeed, claims that the internal market serves as a strong conceptual foundation of EU citizenship are correct. This however, as evidenced by Wollenschläger and Kostakopoulou, does not *de facto* imply that economic motives must always lie at the heart of European citizenship and non-discrimination. The Court has made this clear. A highly educated European polity is not just crucial for a leading competitive market but indeed crucial for basic well-being throughout the Union. Why should one assume that the Court's view of the latter objective is entirely overshadowed by its desire for the former? In the relevant student mobility decisions, not only has the Court refused to label economic integration as an end within itself but also explicitly rules out the need to rely on the economic provisions as a legal means.<sup>71</sup> Regardless, a brief outline of the decisions will be given below, which highlight the grant of two types of education rights for non-economically active migrants: (i) *access* to tertiary studies and (ii) related *financial assistance*, from either the home state or the host state. This will be followed by a critical analysis of the said decisions.

#### 4.2.1. *Access to Tertiary Education*

Almost 30 years ago in the *Gravier and Blaziot*<sup>72</sup> decisions, the Court held that students who move to another Member State to gain access to the education system must be treated in the same way as national students with regard to the imposition of registration fees. This was explicitly to allow students to find the 'specialised subject desired in order to develop their particular talents'. In

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70 For an excellent overview of the legal debate on European citizenship, see D. KOCHENOV, 'The Present and Future of EU Citizenship: A Bird's Eye View of the Legal Debate', 2(12). *Jean Monnet Working Papers: NYU Law School* 2012, whereby Kochenov correctly states: 'The ECJ has made it absolutely clear that EU citizenship does not per se have market-oriented aims and also plays an important role in the lives of those who are not economically active in the context of the Internal Market. The mainstream approach in the literature, which is fully supported by ECJ case-law and secondary EU law instruments consists in characterizing EU citizenship as a *Grundfreiheit ohne Markt*, or lying out with the immediate confines of the single market'.

71 Note that in Case C-76/05 *Schwarz* [2007] ECR I-6849, the Court held that Art. 56 could be deemed relevant provided the school was privately funded. This perhaps raises a host of problems in itself, but the Court went on to state that EU rules on citizenship and non-discrimination apply *regardless* of whether an economic freedom was found to be at play.

72 C-294/83 *Gravier* [1985] ECR I-00593.

*Commission v. Austria*<sup>73</sup> and *Bressol*,<sup>74</sup> the Court was forced to address the legitimacy of quota systems on the number of non-resident students allowed to enter certain degree courses (i.e., subjecting foreign students to extra entrance requirements). It was acknowledged that allowing foreign nationals equal access to tertiary education must not result in a situation whereby a Member State can no longer sustain normative commitments *vis-à-vis* its own citizens – either due to excessive burden on public finances, jeopardizing the quality of education, or a national shortage of certain vital professions, *in casu*, medics. However, the Court once again deemed that any measure to tackle these concerns must be appropriate and necessary in achieving its objective. The national court must assess if such risks are genuine based on ‘objective, detailed analysis, supported by figures’. If such evidence is produced, then a limitation on Article 18 TFEU (non-discrimination) and Article 21 TFEU (free movement) may be justified. These judgments will be critically analysed below (s. 4.3).

#### 4.2.2. *Access to Related Financial Assistance*

A few years following the *Gravier* decision, the Court stipulated in the *Lair*<sup>75</sup> case that students coming to the host state purely for education are entitled to equal access to study grants that cover *tuition fees* but not those meant to cover maintenance costs. In *Forster*,<sup>76</sup> the Court realigned its previous case law<sup>77</sup> with Article 24(2) of Directive 2004/38. This declares that the host state is not required to grant equal treatment to maintenance costs for EU citizens who have not been resident in that state for at least a period of five years. This was deemed by the Union legislator to be a valid time period to prove suitable ties of reciprocity between the beneficiary student and the state.

The issue of exporting study grants (i.e., from the student’s state of affiliation) came to the fore in the *Schwarz*<sup>78</sup> and *Morgan and Bucher*<sup>79</sup> decisions. The former case concerned a German rule that granted tax relief for costs incurred by parents sending their children to private schools within the territory of the state but not for those outside the state. The latter case concerned another German rule that narrowly restricted the granting of maintenance support to students who attend an establishment outside the state. The Court found that the German rules were contrary to the principle of non-discrimination (Art. 18 TFEU) and free movement as laid out in Article 21 TFEU, as it disadvantaged nationals

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73 C-147/03 *Commission v. Austria* [2005] ECR I-5969.

74 C-73/08 *Bressol* [2010] ECR I-2735.

75 C-39/86 *Lair* [1988] ECR 3162.

76 C-158/07 *Forster* [2008] ECR I-8507.

77 See C-209/03 *Bidar* [2005] ECR I-2119.

78 See *supra* n. 71.

79 Joined Cases C 11/05 and C-11/06 *Morgan and Bucher* [2006].

who availed of their mobility rights. Thus, education-related benefits provided within the State must also be exportable for education sought abroad. Note that such benefits must only be up to the amount offered within the national (home state) context.

#### **4.3. *Reflections on the Judicial Interpretation of the Economic Freedoms and ‘Social Justice’ in Education across Europe***

Regarding the decisions on migrant workers’ children, it is clear that when the Court is looking at restrictions on Article 45 TFEU and Regulation 1612/68 – granting access to (and funding for) education – it has placed the child’s interest at the centre of justification. When a family migrates and subsequently installs (i.e., the parent engages in an economic activity and the child begins education) in the host state, that child is entitled to equal opportunity to complete his studies in that state. Essentially, the migrant may only become a beneficiary of education-related entitlements once he/she becomes economically active, so in most instances<sup>80</sup> he/she will also be a net contributor to the financing of that very system. It may be said this ‘intrusion’ of EU economic law is largely premised upon a pragmatic form of market-based solidarity. Furthermore, the economic rules offered the litigants in question a genuine means of objective judicial review – where individual protection is not a narrow exception.

Indeed, the Court must ensure not to overstretch this approach and damage distributive education policies on the national level. Member State governments frequently argued that the education system may become overloaded due to responsibilities to ensure the migrant worker has equal treatment – both to access education and to related financial benefits. In turn, this reduces the capacity to ensure nationals within the host state territory access to high-quality education. Admittedly, it is difficult to prove the existence of such negative externalities. However, indirect measures do provide some insights.

Eurostat data show that less than 1% of EU citizens are settling in a new country of residence each year. Within this group,<sup>81</sup> trends show that the employment rate is quite high – thus, the number of migrants who are net contributors to the funding of the host state education system is quite high. In addition, the percentage of migrants (including ‘post accession’ migrants) seeking state benefits is extremely low.<sup>82</sup> For example in the United Kingdom, one of the

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80 Of course, exceptions to this arise, as seen in the case law, if the migrant ceases the economic activity but his/her children, who are ‘installed’ in the host state, retain their status as a family member of a worker under Regulation 1612/68.

81 See Eurostat estimations on population and social conditions available at [www.ec.europa.eu/eurostat](http://www.ec.europa.eu/eurostat).

82 2013 Commission Report: A fact finding analysis on the impact on the Member States’ social security systems of the entitlements of non-active intra-EU migrants to special non-contributory

largest receivers of EU immigrants, the records show that approximately 84% are employed, while 2.4% rely on some form of social benefits (including those granted for education).<sup>83</sup>

As for the non-economically active migrants (namely tertiary students), the Court recognized the fundamental difference between access to financial aid to cover the costs of education in another Member State (*Bidar*) and access to a particular course in the education system itself (*Bressol*).

In a *Bidar*-like scenario, the costs are shared between the host state and the home state, based on the reciprocal ties the student has with the respective states. The host state may only be required to pay once the student in question has been resident in the said state for a minimum period of five years – a period approved by the European legislator. Furthermore, grants or benefits available in the home state to help students attending an institute in that state must equally be available to students who choose to attend an institute based abroad. The export costs in this scenario are no higher or lower had the student chosen to stay in the home state to study – meaning no increasing demand is put upon the public fund and space is freed up in the home state for the course in question.

A *Bressol*-like scenario – regarding non-discriminatory *access* to particular courses – is more controversial. The first concern here is the risk of placing an excessive burden on public finances. Students who move abroad to study reap the benefits from publicly funded education in the host state but do not contribute to financing it through national taxes nor do they necessarily ‘pay back’ by staying to work in the host state and become taxpayers there. In response to this, Advocate General (AG) Sharpston,<sup>84</sup> Jacobs,<sup>85</sup> and Geelhoed<sup>86</sup> note that students do provide some source of income for local economies where the university is located and also, to a limited extent, for national treasuries *via* indirect taxes. Moreover, in *Bressol*, the Belgian Government explicitly submitted that the objective of the decree in question (limiting access to non-resident students) was ‘not of a financial nature’<sup>87</sup> – but rather to tackle the ‘perverse effects of absolute mobility on the *quality* of education’, especially in regard to medical-related courses.

In response to arguments of ‘overcrowded classrooms’ and lack of qualified medics remaining to work in the host state, neither the Belgian nor Austrian Government had figures available showing the number of non-resident students

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cash benefits and healthcare granted on the basis of residence – DG Employment, Social Affairs and Inclusion *via* DG Justice Framework Contract – Final report submitted by ICF GHK in association with Milieu Ltd., 14 Oct. 2013 (revised on 16 Dec. 2013).

83 N. POLLARD *et al.*, *Floodgates or Turnstiles? Post-EU Enlargement Migration Flows to (and from) the UK*, (Institute for Public Policy Research, 2008).

84 Opinion of AG Sharpston on C-73/08 *Bressol*, para. 96.

85 Opinion of AG Jacobs on C-147/03 *Commission v. Austria*, para. 33.

86 Opinion of AG Geelhoed on C 212/05 *Bidar*, para. 65.

87 *Supra* n. 74, para. 98.



enrolled in the courses at issue before the adoption of the respective quotas. Indeed, it may not be said therefore that national governments must wait passively until significant damage is done to the higher education system. However, as AG Sharpston<sup>88</sup> alludes to: the specific material that would ‘lead a prudent legislator legitimately to conclude that a burgeoning problem needed to be nipped in the bud’ simply did not exist before the respective decrees were enacted. Moreover, to this day, such specific material remains non-existent.

This, of course, does not mean that a serious threat to the quality of education or health care may not arise, but it does mean, according to the Court, that strict evidence-based requirements of such a threat must be satisfied. In December 2012, the Commission increased its suspension period of infringement action against Austria and Belgium until 2016,<sup>89</sup> in order to acquire such evidence and to explore policy options that would reduce overcrowding and possible shortages of qualified personnel. Hence, it is accepted that restrictions may be permissible should the Member State provide clear evidence that the education services provided to its own nationals are directly and adversely affected. Until this is proven, any measure to protect the quality of education or quantity of health personnel must be proportionate and non-discriminatory, not just speculatively precautionary.

It must also be noted that Belgium and Austria (as said governments argued) are not uniquely susceptible to the threat of ‘overcrowding’ in specific courses. According to OECD statistics,<sup>90</sup> in 2011, Belgium had 51,572 non-citizen students out of a total population of 11,047,740 (a ratio of 1:214), and Austria had 70,558 non-citizen students out of a total population of 8,406,186 (a ratio of 1:119). By comparison, Denmark has a ratio of 1:188, Sweden has a ratio of 1:180, Ireland has a ratio of 1:193, and the United Kingdom has a ratio of 1:109. Not only do these figures show that ‘education tourism’ is at play in other nations, but that the overall influx of foreign students and the immanent risk to host state education systems also remain similarly and notably low across Europe.

In sum, the Court has ensured (i) the right for a migrant worker’s child to enter and remain in education in the host state once he/she is installed (and thus acquire equal access to related benefits), (ii) the non-discriminatory right to access tertiary education abroad (pending strong evidence that this is detrimental to the host state in question), and (iii) that any maintenance costs for tertiary

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88 AG Sharpston, *supra* n. 84, para. 711.

89 In 2008, Austria and Belgium had established monitoring systems and conducted forecast studies on supply and demand for medical personnel.

90 UNESCO-OECD-Eurostat (UOE) data collection on education statistics, compiled on the basis of national administrative sources, reported by Ministries of Education or National Statistical Offices. Available at <http://stats.oecd.org/Index.aspx?DataSetCode=RFOREIGN>.



education are shared between the host state and the home state dependant on ties of reciprocity the student has with the respective states. Any fears of a CJEU neo-liberal agenda, supporting private autonomy to the detriment of Member State education policies, are largely unfounded.

## 5. Economic Freedoms and Fundamental Human Rights

This section will look at the specific instances in which the economic freedoms have come into play with fundamental rights and how these decisions reflect against the normative yardstick of ‘social justice’<sup>91</sup> outlined in section 2 above. The essential question is once again: was the right balance struck?

Fundamental ‘human’ rights were not mentioned in the original treaties and only came into the realm of EU law when the CJEU announced them as ‘general principles’ in 1969.<sup>92</sup> Today, Article 6 TEU underlines the important status fundamental rights have gained in EU law by stating that the Charter of Fundamental Rights (CFR) shall have the same legal value as the Treaty. This means they are now formally binding and can be used to challenge both EU and Member State actions. As the core concern of this article regards the Court’s interpretation of specific economic mobility provisions and national conceptions of the ‘public good’, this section will focus on situations when Member States and powerful non-state actors interfere with the aforementioned freedoms.<sup>93</sup> There are two general types of cases that arise in this scenario: (i) cases whereby the interference with economic mobility infringes fundamental rights – i.e., EU law acts as a ‘shield’ for fundamental rights, and (ii) cases whereby the interference with economic mobility is for the protection of fundamental rights – EU law acts as a ‘sword’.

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91 For an excellent analysis on the interaction between private law rules, fundamental Treaty freedoms, and fundamental rights in the EU, see both CHEREDNYCHENKO, 1. *ERPL* 2006, pp. 23–61 and COLOMBI CIACCHI, *supra* n. 13. For a comprehensive analysis of a comparison comparative analysis of the impact of fundamental rights on contractual relationships in Germany, the Netherlands, Italy, and England, see C. MAK, *Fundamental Rights in European Contract Law* (Kluwer, 2008).

92 C-26/69 *Stauder* [1969] ECR 419.

93 In *ERT*, it was held that when Member States derogate from EU rules, they are considered to be ‘acting within the scope’ of EU law and, as such, obliged to respect fundamental rights. Note that there arguably exists a self-standing obligation to respect fundamental rights (see Case C-71/02 *Karner* and Case C-555/07 *Kücükdeveci*); however, this will not be discussed here. For an excellent discussion on this, see DE VRIES, p. 12.

### 5.1. *Interference with Economic Mobility that also Infringes Fundamental Rights*

Cases such as *ERT*,<sup>94</sup> *Baumbast*,<sup>95</sup> and *Carpenter*<sup>96</sup> are all examples of when the fundamental freedoms have acted as a repository for fundamental rights. In *ERT*, the Court held that in order for a national statute granting one company exclusive television and radio rights to be considered a justified restriction on the free movement of services, it must be appraised in the light of Article 10 ECHR on the freedom of expression. In *Baumbast*, described in more detail in the section above, the free movement of workers and relevant secondary legislation were used as a tool in order to keep the family unit in the one territory (Art. 8 ECHR). In *Carpenter*, the Court found that deportation of Mrs Carpenter, and the consequent separation between husband and wife would be detrimental to their family life (again Art. 8 ECHR) and, therefore, to the conditions under which Mr Carpenter exercises a fundamental freedom (see para. 39). Here, it may well be argued that the protection of the right to family life is not strictly necessary to the provision or receipt of services. Indeed, Mr Carpenter was providing advertising space to customers in other Member States before he met his wife. As noted by Chalmers, to truly understand the Court's reasoning in the above decisions, we must interpret the 'economic' freedoms as part of a 'wider panoply of socio-economic entitlements and human rights to which all EU citizens should be entitled'.<sup>97</sup>

### 5.2. *Reliance on Fundamental Rights to Justify Interference with Economic Mobility*

As de Vries aptly points out, the *Schmidberger*<sup>98</sup> case is somewhat of a *locus classicus* for conflicting rights in EU law.<sup>99</sup> The facts of the case involved an environmental demonstration on a motorway, which disrupted the flow of goods from Italy to Austria. The protest took place on a single route, on a single occasion, and during a limited period. The Court recognized that 'whilst the free movement of goods constitutes one of the fundamental principles in the scheme of the Treaty, it may in certain circumstances be subject to restrictions' (para. 78). Equally, it was held that the right to freedom of expression and assembly may be limited by the economic freedoms. Due to the proportionate manner in which

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94 C-260/89 *ERT* [1991] ECR I 2925.

95 See *supra* n. 67.

96 C-60/00 *Carpenter* [2002] ECR I 6279.

97 See D. CHALMERS *et al.*, *European Union Law; Cases and Materials* (1st edn, Cambridge: CUP, 2008), p. 758.

98 C-112/00 *Schmidberger* [2003] ECR I 5659.

99 S. DE VRIES *et al.*, *Balancing Fundamental Rights with the EU Treaty Freedoms: The European Court of Justice as 'Tightrope' Walker* (Utrecht: Europa Instituut, 2012).

the strike took place and the preparatory steps taken by the Austrian government, the action was not deemed an unjustified derogation.

In *Omega*,<sup>100</sup> the Court again accepted the restriction of an economic freedom (this time regarding services) in order to adequately protect fundamental rights.<sup>101</sup> This case involved a German company, Omega, who operated a 'shoot-to-kill' laser game using sensory tags attached to the body. These tags were manufactured by the British company Pulsar (hence, the cross-border element). The police in the German state Nordrhein-Westfalen ordered a prohibition of the games as they simulated homicide and were considered to be in violation of the respect for human dignity under the German Constitution. In granting quite a wide margin of appreciation to the German authorities (and also stating that respect for human dignity<sup>102</sup> was a general principle of Community law), it was held to be a suitable measure and thus a justified restriction on EU law.

Up to this point, the relationship between fundamental rights and derogations from the economic freedoms seemed quite politically harmonious. *Omega* was followed by decisions like *Sayn Wittgenstein* and *Dynamic Weiden*, whereby considerable Member State discretion was adopted. There was a strong smell of respect for constitutional pluralism in the air. However, it was a sense all but forgotten a few years later when a stale can was blown open, containing the ugly realities of the economic and social disparities between the workers from the centre and the workers from the periphery. The *Laval*<sup>103</sup> and *Viking*<sup>104</sup> decisions caused an unprecedented uproar not just in legal academia<sup>105</sup> but also among social scientists, political scientists, the media, and the general public. Fritz

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100 C-36/02 *Omega* [2004] ECR I 9609.

101 See COLOMBI CIACCHI, *supra* n. 21.

102 See for a discussion on utilizing the dignity argument to give a social angle to the rights discourse within the construction of European private law, M.R. MARELLA, 'A New Perspective on Human Dignity: European Contract Law, Social Dignity and the Retreat of the Welfare State', in S. Grundmann (ed.), *Constitutional Values and European Contract Law* (Kluwer, 2008), pp. 124-147. See also in this respect A.L.B. COLOMBI CAICCHI, 'Social Rights, Human Dignity and European Contract Law', in S. Grundmann (ed.), *Constitutional Values and European Contract Law*, Wolters Kluwer, 2008, pp. 149-160.

103 C-341/05 *Laval* [2007] ECR I-11767.

104 C-438/05 *Viking* [2007] ECR I-10779.

105 JOERGES & RODL, 15(1). *ELJ* 2009, pp. 1-19; C. KILPATRICK, 'Laval's Regulatory Conundrum: Collective Standard-Setting and the Court's New Approach to Posted Workers', 34. *ELRev* 2009; K. APPS, 'Damages Claims against Trade Unions after Viking and Laval', 34. *ELRev* 2009, p. 141; S. DEAKIN, 'Regulatory Competition after Laval', 364. *CBR Working Paper* 2008, pp. 15 and 856. For less condemning perspectives on the decisions, see H.W. MICKLITZ, 'Three Questions to the Opponents of the Viking and Laval Judgments', in *European Social Observatory (Opinion Paper, No. 8)*; N. REICH, 'Free Movement v Social Rights in an enlarged European Union - the Laval and Viking Cases before the ECJ', 9(2). *German Law Journal* 2008, and L. AZOULAI, 'The Court of Justice and the Social Market Economy: The Emergence of an Ideal and the Conditions for Its Realization', 45. *Common Mkt Law Rev (Common Market Law Review)* 2008, pp. 1335-1356.

Scharpf even coined the headline: ‘The only solution is to refuse to comply with ECJ rulings’, where it was advocated to ignore the judgments until there was a check of the political consensus.

Although every European legal scholar is probably familiar with the cases, it is still necessary to briefly explain the facts. In *Laval*, a Latvian undertaking wished to temporarily post its workers in Vaxholm, Sweden for a construction job on a school. They were to be paid considerably less than local tradesmen and were thus using their competitive advantage (much cheaper costs) to undercut the Swedish workers. The relevant Swedish labour union responded by blockading and picketing the site, before gaining supportive ‘sympathy strikes’ from other labour unions, eventually forcing Laval and its employees to return home. It seemed like the Swedish unions had saved the day, looked ‘social dumping’ in the eye, and won. However, this does not nearly paint the entire picture.

Nobody can argue that it was not an attempt at ‘social dumping’ – the unfair use of lower conditions to undermine competitors with higher standards of social protection (minimum wage, in this case). However, the EU Posted Workers Directive (PWD) was created exactly to circumvent such practice.<sup>106</sup> It requires each Member State to lay down a ‘nucleus’ of mandatory rules for minimum protection that must be observed by employers who temporarily post workers outside of their home state. Among other things, this nucleus must contain minimum rates of pay, the issue at the heart of the *Laval* conflict. Such rules are designed to ensure legal certainty for foreign undertakings entering the market and, at the same time, secure the adequate protection of workers. These *minimum* rules do not prevent the application of conditions more favourable to workers. This means that contracts more favourable to workers may be *voluntarily* agreed upon, but conditions above the identifiable host state minimum nucleus *cannot be forced* upon the parties. These minimum rules according to Article 3 of the Directive may be set out (i) by law, regulation, or administrative provision, (ii) by collective agreements declared universally applicable, or (iii) by collective agreements that are considered generally applicable. It is up to the Member State which of these regulatory options to choose.

Crucially, the Swedish labour model was entirely decentralized at the time, entrusting management and labour, on a case-by-case basis at the place of work, with the task of setting minimum wages. This system simply did not provide for mandatory minimum rates of pay as required by Article 3 of the PWD. Furthermore, according to Swedish law at the time, once a collective agreement is signed, the workers to that agreement are mandatorily bound and any collective

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106 For a broader discussion on social dumping and EU labour legislation, see H. COLLINS, ‘Social Dumping, Multi-level Governance and Private Law in Employment Relationships’, in D. Leczykiewicz & S. Weatherill (eds), *The Involvement of EU law in Private Law Relationships* (Hart, Oxford 2013).

action subsequent to the agreement is prohibited. However, under the so-called *Lex Britannia*, this immunity from strike action was only to be granted to agreements signed by a Swedish trade union. Therefore, a collective agreement signed by a foreign trade union, regardless of its conditions for the employees, was granted no protection whatsoever on the Swedish labour market from collective action. Could this rule be said to be in the interest of protecting *all* workers (as the PWD requires) or rather to protect *Swedish* workers? The answer is, perhaps, in the question.

The neutrality of the Swedish state was, in effect, a delegation of power to the national labour unions to restrict the EU freedoms. If the foreign undertaking providing services temporarily within their territory does not comply with the almost mysterious minimum Swedish labour standards, the trade unions (representing, of course, mainly Swedish workers) are free to do with that undertaking as they choose, until they either sign the agreement imposed upon them or (more preferably from the Swedish workers' perspective) leave the market in question. The Swedish trade unions could have made use of Articles 5(2) and 6 of the PWD. This would have allowed the trade union to initiate legal proceedings against the employer before the Swedish court and ensure (or at least attempt to ensure) that the employer pay a fairer salary by legal means. Of course, no Swedish court could guarantee those employees would be Swedish, it could just impose a minimum salary. In comparison to an assertive countrywide strike, which could almost guarantee the removal of (and indeed did remove) Latvian workers from the market, the legal route was evidently less appealing. The Court essentially held that Article 56 and Article 3 PWD precluded the Swedish labour model and the trade union from acting in the manner it did.

Popular legal discourse on this decision begins with a strong distinction between the Latvian worker's '*economic*' right and the Swedish worker's '*social*' or '*fundamental*' right. This distinction is misleading and results in a biased discussion as to the real conflict at play. First, as Damjan Kukovec recently wrote, what is '*social*' and what is '*economic*' depends entirely on your perspective, rather like Wittgenstein's duck/rabbit portrait. Indeed, he correctly acknowledges that 'what from one perspective looks like a protection against harm, from another perspective looks like a claim for autonomy'. In the distributional sense, social rights are nothing else than economic.<sup>107</sup> Nonetheless, the strong '*economic*' v. '*social/fundamental*' dichotomy is adopted in most literature on *Laval*, with the latter (the Swedish workers claim) naturally deemed of greater significance from the outset.

Leaving this dichotomy aside, serious questions do arise regarding the Court's decision and require some elucidation here. The crucial points to be

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107 D. KUKOVEC, 'A Critique of the Rhetoric of Common Interest in the European Union Legal Discourse', 4. *Harvard Law School* 2008.

considered are threefold: (i) the relationship between the fundamental right to social action and the fundamental freedoms, (ii) the horizontal effect of the fundamental freedoms,<sup>108</sup> and (iii) the actually balancing act performed by the Court. In relation to the first issue, the Swedish government along with most ‘old member countries’ argued that as industrial action falls outside EU competence, it must therefore fall outside the application of the fundamental freedoms. As made clear in the above sections on health care and education (not to mention decisions in regard to direct taxation,<sup>109</sup> war pensions,<sup>110</sup> or the property regime<sup>111</sup> not discussed here), this argument is untenable. It is well established that the *competence* of the Union is a different matter than the *scope of application* of Union law.<sup>112</sup> The exercise of all Member State social policies must comply with EU law and may be constrained. This does not result in centralized action at the EU level but instead criteria to ‘evaluate all policies pursued in a wider-context, the transnational context’.<sup>113</sup> In short, this provides a ‘recontextualizing’ function and a ‘reprogramming function’, whereby Member States must ‘denationalize’ their normative standards to the objectives of integration.<sup>114</sup> *In casu*, trade unions should not be able to act without taking into account workers from other Member States. Furthermore, the decision in *Werhof*<sup>115</sup> clearly demonstrates that the Court does not consider the ‘social action’ rights of labour unions to fall outside EU law (primary or secondary). Indeed, one who condemns the *Laval* decision for undermining a key human right must not ignore a different yet related key principle stemming from *Werhof* – the freedom of association contains the equally fundamental ‘negative’ side of the right to strike, which Saudre calls *droit d’association négatif*, i.e., the right not to be forced to sign a collective agreement. This was recognized by the European Court of Human Rights over 15 years ago, incidentally in proceedings against Sweden.<sup>116</sup> One may wonder as the positive side of the right is of such

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108 For a broader analysis on this issue, see COLOMBI CIACCHI, *supra* n. 13.

109 Joined Cases C-544/03 and C-545/03, *Mobistar SA v. Commune de Fléron and Belgacom Mobile SA v. Commune de Schaerbeek* [2005] ECR I-7723.

110 C-192/05 *Tas Hagen, R. A. Tas v. Raadskamer WUBO* [2006] ECR I-10451.

111 C-350/92 *Spain v. Council* [1995] ECR I-1985.

112 In response to the argument that the limited application of Community rules to collective bargaining action in competition law (as applied in Case C-67/96 *Albany* [1999] ECR I-5751, para. 54) should be used by analogy to the EU freedoms here, two points must be made: first, Albany concerned competition law where business and labour organizations negotiated over a pension fund; it did not concern industrial action, and second, there is ‘no statutory exemption’ from the application of EU free movement for collective action that renders market access more difficult for foreign individual businesses.

113 See AZOULAI, *supra* n. 105.

114 *Ibid.*

115 Case C-499/04 *Werhof v. Freeway Traffic Services GmbH & Co KG* [2006] ECR I-2397, para. 33.

116 See decision *Gustavsson v. Sweden* ECHR [1996] 637.

‘fundamental’ importance, then why is the other side of that right (equally at play, but for the Latvians) readily ignored in popular discourse.

As for the second main issue on horizontal effect, the Court adopted a functional (*effet utile* argument) approach. It relied upon its case law, whereby the free movement provisions shall apply between private parties when:<sup>117</sup> (i) the private party is an organization regulating in a collective manner employment or self-employment<sup>118</sup> or (ii) the private party imposes a discriminatory condition as part of an established regional practice in relation to access to employment.<sup>119</sup> The Court recognized that the collective action of the trade union is aimed at the conclusion of an agreement that is meant to regulate the work of the employees collectively. As Azoulai points out, this means that trade unions are not bound by the freedom of movement in so far as they assume a state regulatory task but are actually bound in so far as they behave as *powerful* social actors. The right to strike and the right of collective bargaining have to be understood as types of power: power to strike and power to negotiate. Therefore, instead of conferring on collective actions a certain judicial immunity, the recognition of strike action as a *power* demands certain control.<sup>120</sup> On a transnational level, this requires taking responsibility of excluded interest from other Member States – a responsibility that the Court did not shy away from.

On the final point regarding the actual reconciliation of economic and social requirements, one main criticism arises. Initially, the Court did recognize the right to strike as a fundamental right that may serve as a justified restriction on Article 56 TFEU. Unfortunately however, this recognition arose with regard to the question of whether the exercise of the right to take collective action falls within the legal scope of the economic provisions. It was not explicitly restated when actually balancing the conflicting rights. Here, the Court did not recognize the ‘fundamental right’ nature of collective action (as it did earlier in the decision on the scope of EU law) but accepted the protection of workers as an ‘overriding’ public interest, which may justify a restriction on the fundamental freedoms. It should have explicitly repeated that collective action is a fundamental right as such and may justifiably be restricted by the economic freedoms and vice versa. This would have displaced any burden of proof put upon the protection of the

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117 Note the other exception: if the party is apparently private but is actually acting on behalf of the state, see Case C-325/00 *Commission v. Germany* [2002] ECR I-9977.

118 Case C-415/93 *Bosman* [1995] ECR I-4921. *Bosman*; Case C-309/99 *Wouters* [2002] ECR I-1577.

119 Case C-281/98 *Angonese* [2000] ECR I-4139.

120 Note that this recognition of strike action as a power that demands control is evident in every welfare state in the EU – nowhere is the right to strike absolute. It must always occur within the qualifying limits of the law (see also Art. 28 Charter). For example, in the United Kingdom, there exists no self-standing right to strike. Instead, workers must rely on a narrow exception from tortious liability.



fundamental right.<sup>121</sup> Quite simply, the Court could have taken a more *Schmidberger*-like approach when outlining the balance to be taken (see para. 89 of the said decision). In other words, in assessing whether the restriction was objectively justified, the Court should not only have *explicitly* recognized the protection of fundamental rights in light of the economic freedoms but it also should have recognized the degree of interference the protection of the economic freedoms has on the fundamental right in question. In a sense, a type of ‘double proportionality test’ is required. As AG Trstenjak said in *Commission v. Germany*:<sup>122</sup> such an analysis should not be confined to the appropriateness and necessity of restricting a fundamental right in light of the benefits of the economic freedoms, it must *also* include an assessment of whether the restriction of the economic freedom is appropriate and necessary for the benefit of protecting the fundamental right.

In sum, most commentators have picked up on this as an unacceptable weakening of the fundamental right to strike, as a decoupling of the social from the economic constitution. Looking beyond the methodological failures of the Court, it is maintained here that the restriction at hand remained objectively unjustifiable given the nature of the *Lex Britannia* and the Swedish labour model. The decision represented a small win for the workers on the periphery. They were protected from illegitimate strike action and guaranteed equal treatment should they seek to provide services in Sweden. Any claims of neo-liberalism in *Laval* are unfounded and expose an unwarranted phobia of the periphery.<sup>123</sup> It is safer to say that the result in this instance is better explained by the rationale underlying neo-corporatism.<sup>124</sup>

The decision in *Viking* has also been subject to heavy criticisms, although unlike in *Laval*, the PWD was not at issue and the CJEU did not apply the proportionality test itself but left it to the referring national court. Popular critique claims that this decision further confirmed the CJEU’s lack of respect for the fundamental right to strike. Essentially, the Court restated such a right is not absolute (nothing new here from a national or international law perspective), and

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121 On this, see A. SOMEK, ‘Das europäische Sozialmodell: Diskriminierungsschutz und Wettbewerb’, 3. *Juridikum* 2008, p. 118.

122 Case C-503/04 *Commission v. Germany* [2007] ECR I-06153.

123 Empirical data on the number of posted workers throughout the Union remain quite low. Furthermore and in spite of populist views from the centre, it is not Romania, Bulgaria, and other countries on the periphery who send the most posted workers, but France, Poland, and Germany. They are then followed by Luxembourg, the Netherlands, Belgium, and Portugal. See European Commission report on ‘Posting of Workers in the European Union and EFTA Countries’ in 2008, 2009, and 2010.

124 After all, the Swedish State was required to be more present in the regulatory process. See E. ENGLE, ‘A Viking We Will Go! Neo-Corporatism and Social Europe’, 11(6). *German Law Review* 2010, pp. 633–652.



it will be deemed a justified restriction on Article 49 TFEU provided its objective is the protection of workers, that it is suitable for ensuring the attainment of this legitimate objective, and it does not go beyond what is necessary to achieve this objective. Therefore, when the jobs or conditions of employment at issue are not jeopardized, the strike action cannot be justified.

Critics have argued that the *Viking* decision disfavors the labour movement because effective industrial action provokes economic dislocation.<sup>125</sup> However, this is equally a reason as to why industrial action ought to be treated with caution – it is powerful. Any *unnecessary* disruptions of production flows ultimately disfavor the individual worker. As AG Maduro pointed out, the key question is to what ends collective action may be used and how far it can go. In the current case, the International Transport Workers Federation's (trade union in question) policy on 'flags of convenience' required the *automatic* instigation of collective action upon request by one member (the Finish Seaman's Union in this case), '*irrespective* of whether or not the owner's exercise of its right of freedom of establishment is liable to have a harmful effect on the work or conditions of employment of its employees'. Note in this respect an undertaking given by Viking (the owner) that no employees would be made redundant due to the reflagging of the ship. In addition, one must be aware of the potential nationalist motives behind the automatic initiation of strike action *irrespective* of the owner's harmful effect on employee well-being or conditions of work. Surely, such strike action should be treated with caution. In any case, the application of the proportionality test here was left to the referring court. Subjecting collective and coercive means of action to the test of justification<sup>126</sup> does not appear, at least to the author, to be a cause for such grave concern.

However, the same criticisms may be directed at the Court's motivation in this decision as in the *Laval* decision. The weighing up of economic freedoms and fundamental rights did not require an implied *a priori* hierarchy of rights. Again, the Court failed to make this clear, leaving a largely balanced outcome open to unnecessary but valid concerns in how that balance was actually achieved.

## 6. Conclusions

In protecting market actor autonomy from state and powerful non-state actor interference, it is quite clear that the above judgments conform to some model of the 'private law society' – however, is this model more neo-liberal or ordo-liberal?

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125 A.C.L. DAVIES, 'One Step Forward, Two Steps Back? The Viking and Laval Cases in the ECJ', 37. *Indus L.J. (Industrial Law Journal)* 2008, p. 126.

126 The strike must be (i) aimed at protecting workers, (ii) whose job or conditions of employment were under serious threat, and (iii) when the trade union had exhausted any other means at its disposal.

More generally, what can be said about the effects of the above decisions in the quest to achieve a ‘socially just’ Europe?

Admittedly, such a case-by-case approach results in some degree of regulatory uncertainty and is vulnerable to political attack. This is even more so in sensitive policy areas of national control. In a number of the decisions examined (particularly *Laval* and *Viking*), legitimate concerns remain over the Court’s explicit reasoning and methodology. As warned by de Vries and others,<sup>127</sup> the Court must not engage in automatically subordinating fundamental rights to the economic freedoms (i.e., justifying fundamental rights in light of the latter).<sup>128</sup> This does not necessitate excessive formalism but rather the explicit rejection of a *a priori* hierarchy between the two.<sup>129</sup> Just as the economic freedoms should not be given a higher status than fundamental rights, they do serve the backbone of the Union and must not be considered *de facto* inferior. It is important to note that this is a criticism of the Court’s methodology and, in light of the above analysis, not at the actual substantive outcome. Although this methodological failing is a legitimate concern and should not be downplayed, it must be contextualized in light of the following observations.

First, the normative individualistic<sup>130</sup> approach favoured by the Court in the above decisions (i.e., that state and powerful non-state actor interference must be justified in the last instance to the concerned individual) was guided by non-discriminatory criteria, free from parochial bias. Excluded individual interests were effectively incorporated into national policymaking *via* a form of transnational justice that Micklitz describes as *access justice*.<sup>131</sup> In doing so, the Court adopted a type of ‘original position’ to reduce the negative externalities of norms developed within the nation state (i.e., limited to territorially based notions and political membership).

Second, the above decisions evidence how blurred the distinction between the ‘economic’ and the ‘social’ really is. As Colombi Ciacchi points out that the classic distinction between liberty (first generation) rights and social (second generation) rights is vulnerable to semantics – what matters is how they are applied in practice.<sup>132</sup> The same holds true regarding distinctions made within the category of ‘social’ (second generation) rights itself. This is taken for granted in popular legal and political discourse on the decisions at hand. This study highlights how ‘economic’ mobility was applied in practice as a means to achieve

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127 DE VRIES *et al.*, *Balancing Fundamental Rights with the EU Treaty Freedoms: The European Court of Justice as ‘Tightrope’* Walker, p. 32.

128 See SOMEK, *supra* n. 121 and also COLOMBI CIACCHI, *supra* n. 21.

129 For further discussion on this, see DE VRIES, *supra* n. 127, p. 42.

130 See COLOMBI CIACCHI, *supra* n. 21.

131 See MICKLITZ, *supra* n. 13.

132 COLOMBI CIACCHI, in S. Grundmann (ed.), *Constitutional Values and European Contract Law*, p. 149.

fundamental human entitlements (regardless of preferred classification) – such as access to crucial health care, the continuation of one’s education, integration into society, and the protection of fair employment opportunities. Thus, the simplified *economic v. social* dichotomy colours the true application of economic mobility in tainted political terms and ignores the more wholesome conceptualization of these mobility provisions. A fairer critique must recognize that each decision concerned *freedoms* and *limitations*. As Kukovec points out,<sup>133</sup> once we recognize this, we begin to look at policies and justifications with a more balanced nuance. ‘Economic’ mobility in the above decisions was not understood by the Court as an end in itself but rather as the *primary* functional means – at the Court’s disposal – to protect individual freedom from disproportionate limitations.

Third (and perhaps most importantly), such protection has not resulted in a situation whereby the other normative objectives of social justice are ignored. Interstate economic private legal relations and public law values were understood as necessary *compliments*. Using the proportionality principle as its central axiom, the decisions in question did not ignore redistributive national goals or negatively impact the social claims economic mobility relies upon – rather, it may be argued that the opposite occurred and the decisions compensated somewhat for inadequate national policies. No evidence above suggests that the Court’s protection of such market transactions has jeopardized the stability of national health care systems (s. 3), education services (s. 4), or the protection afforded to human rights (s. 5). Discretionary state power has indeed been limited but not to a *laissez faire* extent. In none of the above decisions did an end to all regulation occur. The term deregulation often used here is notoriously misleading.<sup>134</sup> In practice, what occurred is a combination of deregulation and re-regulation, with the end result often increased regulation (e.g., clearer rules on cross-border health care or on market access for posted workers).

Finally, should Europe be in the midst of what Weiler may call a ‘constitutional moment’, the acute issue does not appear to be the judicial entrenchment of neo-liberalism but rather the unwarranted condemnation in popular discourse of the substantive outcomes actually reached in the above decisions. Although this article only focused on the judicial branch of the EU, certain economic mobility provisions, and the normative objectives of ‘social justice’ in specific policy areas, it does nonetheless evidence some worth in perceiving the EU’s performance *and* *raison d’être* more holistically.

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133 See KUKOVEC, *supra* n. 107.

134 See, for more on this, G. MAJONE, *Deregulation or Re-regulation? Policy Making in the European Community since the Single Act*, EUI Working Paper SPS, No. 93/2.



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# EUROPEAN REVIEW OF PRIVATE LAW REVUE EUROPÉENNE DE DROIT PRIVÉ EUROPÄISCHE ZEITSCHRIFT FÜR PRIVATRECHT

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